Supreme Court, U.S.
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No. 96-

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

CRAIG B. SOKOLOW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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December 1996

QUESTIONS PRESENTED

1. If a document would be inadmissible against a federal criminal defendant under Fed.R.Evid. 803(8)(C) as presenting the results of an official investigation, may it nevertheless be admitted as a business record under Rule 803(6); if so, is a document admissible as a business record if it consists of a compilation of third-party claims and is offered to prove the truth of those claims?

2. Does the admission in evidence in a federal mail fraud case of an interlocutory state court judicial opinion branding the defendant guilty of conducting a unlicensed insurance business, whose holding was later rejected by a higher court, require the allowance of a new trial?

3. Does the federal money laundering forfeiture statute, 18 U.S.C. § 982(a), permit an indictment, verdict and judgment for the forfeiture of a specified sum of money, without ever identifying the specific "property involved" in the offense?

4. Prior to its 1988 amendment, did 18 U.S.C. § 982 permit the criminal forfeiture of the proceeds of mail fraud under statutory language authorizing only the forfeiture of the proceeds of a defendant's money laundering?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Craig B. Sokolow and the United States). There were neither co-defendants in the indictment nor co-appellants below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CRAIG B. SOKOLOW respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on July 26, 1996, affirming his conviction and sentence for mail fraud and conducting transactions with the proceeds.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, filed on July 26, 1996 (per Restani, J. [Ct. of Int'l Trade], with Mansmann, J., and Scirica, JJ.), affirming petitioner's convictions on direct appeal, is published as United States v. Sokolow, 91 F.3d 396. A copy is attached as Appendix A. (An earlier version of the opinion, initially published at 81 F.3d 397, was vacated and withdrawn. Appx. A2) There is no published opinion of the District Court. Two unpublished memorandum opinions of the district court pertinent to this petition are attached as Appendices B and C; they are available at 1994 WL 613640 and 1995 WL 113079 respectively.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the

First Circuit was filed July 26, 1996. Appx. A. On September 16, 1996, the court of appeals denied the applicant's petition for rehearing, with Judges Becker, Stapleton and Roth dissenting. Appx. D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

Title 18 of the United States Code, section 982, provides, in part:

> § Criminal forfeiture
>
> (a)(1) The Court, in imposing sentence on a person convicted of an offense in violation of section ... 1957 ... of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense or any property traceable to such property. ...

Prior to November 18, 1988, 18 U.S.C. § 982 permitted the forfeiture of

> any property, real or personal, which represents the gross receipts the person obtained, directly or indirectly, as a result of such offense, or which is traceable to such gross receipts.

18 U.S.C. § 982(a) (Supp. V 1987)

The hearsay chapter of the Federal Rules of Evidence provides, in part:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * *

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

* * * *

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth, ... (C) in civil actions and proceedings and against the Government in criminal cases, factual

findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Article I, section 9, clause 3 of the Constitution of the United States provides: "No ... ex post facto Law shall be passed."

STATEMENT OF THE CASE

This petition presents issues that arose during a jury trial and sentencing on federal charges of mail fraud and conducting transactions with proceeds, involving a health benefits plan.

a. Procedural History

On August 31, 1993, a grand jury sitting in the Eastern District of Pennsylvania returned a 143-count indictment charging the appellant, Craig Sokolow, under 18 U.S.C. § 1341 with mail fraud (125 counts) and money laundering (17 counts under id. § 1957), and in one count under 18 U.S.C. § 982 with criminal forfeitures. CA3 App. A38-92. Trial before James McGirr Kelly, U.S.D.J., and a jury consumed some two months in early 1994. The court first denied the government's motion to "preclude relitigation" of issues allegedly determined by an interlocutory decision of the Pennsylvania Commonwealth Court. CA3 App. A18. Deliberations lasted for five-plus days,

but on March 21, 1994, the jury returned verdicts of guilty on Counts 1-3, 5-76, and 94-142, and found for forfeiture under Count 143. CA3 A974-83 (special verdicts).[1]

Post-trial motions were denied. Appx. B.

b. The Sentencing and Forfeiture Proceedings

Pre-sentencing proceedings were held over three days in early 1995, with evidence concerning forfeiture, loss calculations, and restitution. On March 14, 1995, the district court filed a memorandum determining an offense level of 28, another determining a restitution obligation at $690,246.34, and a third opinion finding that the forfeiture should be in the amount of $2,141,108.67 and authorizing seizure of certain substitute assets to satisfy that judgment. Appx. C.

On April 11, 1995, the court imposed a term of 92 months' (7 years, 8 months') imprisonment, to be followed by three years' supervised release, a $50,000 fine, $6200 in special assessments, $690,246.34 in restitution, and the forfeiture of $2.1 million.

c. The Appeal

On appeal, the Third Circuit affirmed the convictions and sentence,

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[1] The other counts had been dismissed mid-trial on government motion.

with the exception of a remand for the purpose of redetermining the restitution as to certain alleged victims. In response to petitioner's intial petition for rehearing below, the panel vacated its opinion, which had already been published in the advance sheets, 81 F.3d 397, and issued a revised opinion. Appx. A; 91 F.3d 396. A renewed petition for rehearing was denied, with three members of the Court dissenting: Judges Becker, Stapleton and Roth. Appx. D.

Statement of Lower Court Jurisdiction Under Rule 14.1(i). The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) and was timely invoked by Notice of Appeal filed after entry of judgment. Fed.R. App.P. 4(b). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses.

d. Statement of Facts

The National Independent Business Association (NIBA[2]) provided various

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[2] At different times the association was known as the American Independent Business Association AIBA), the Pennsylvania Independent Business Association (PIBA) and the National Independent Business Association (NIBA). CA3 App. A38-A39. The latter appellation was used most frequently at the trial.

services, including health insurance, to its members. The health plan was established through a contract with World Life Insurance Company and from May, 1987, through a plan reinsured and administered by Independence Blue Cross of Pennsylvania. Petitioner Sokolow was NIBA's president.

The World Life plan was fully underwritten and paid Sokolow significant commissions on each member. CA3 App. A873. The Blue Cross plan was partially underwritten by NIBA itself, through reserves set, paid to, and held by Blue Cross. Sokolow marketed the Blue Cross plan through his own insurance agencies, using independent brokers.

The indictment charged that Sokolow misrepresented the Blue Cross plan as being fully insured by Blue Cross, thus defrauding members of their premiums. CA3 App. A43-A45. The defense contended that the marketing materials reflected Sokolow's reliance on Blue Cross' expertise in developing the published material distributed to members. Some plan members whose claims were not fully paid testified that they believed they had full Blue Cross coverage. CA3 App. A127, A187, A190.

In mid-1988, Blue Cross demanded that NIBA increase its reserve by more than $2 million, payable within 15 days. To extend the administration agreement for two months while NIBA located other

insurance, petitioner paid Blue Cross $1.8 million to cover claims submitted by September 1, 1988. Blue Cross's final, year-end bill claimed that NIBA owed another $2 million.

Petitioner then developed his own plan. NIBA was solely responsible for the first $50,000 of each member's claims per year. Sokolow informed Association members that the Sure Care plan was "reinsured" by TransAmerica Life. The indictment alleged that petitioner misrepresented that Sure Care was fully insured when it was mainly self-insured, and that he failed to disclose that Sure Care was not independent of NIBA.

In early 1989, petitioner objected to the Pennsylvania Insurance Department's inquiries on the ground that his organization was a Multi-Employer Welfare Association (MEWA), which could file a benefits plan under the auspices of ERISA and was not subject to state Insurance Department regulation. However, on May 2, 1989, the Department, without warning, suspended NIBA's operation. NIBA went into liquidation on February 15, 1990.

During the period covered by the indictment, Sokolow was paid $1.97 million in commissions and $1.8 million in salary, officer's loans, and other disbursements. Sokolow spent this income or deposited it in bank and brokerage accounts in his own and immediate family members' names. An agent of the U.S.

Department of Labor traced the source of $2,141,108.67 of funds which were the subject of the money laundering counts from NIBA to various Sokolow accounts and purchases, but not the remainder.

The prosecution contended that as of May, 1989, NIBA was underfunded in relation to pending and prospective claims. This was disputed on the basis of both available assets and amount of claims due. Sokolow's defense at trial was that there were no misrepresentations, and that the actions of Blue Cross in incorrectly adjudicating claims and abruptly refusing to renew his contract, in conjunction with the Insurance Department's precipitous suspension of his business were the causes of NIBA's business reversals and the source of NIBA's funding problems.

REASONS FOR GRANTING THE WRIT

1. The ruling that the government's key proof of underfunding was admissible as a business record is contrary to the Federal Rules of Evidence, as interpreted in other Circuits.

Certiorari should be granted to review the ruling of the court below upholding the admission of Government Exhibit B-110, the computer compilation of adjusted, unpaid claims prepared by Inservco for the state Insurance Department. The Third Circuit correctly ruled

that the district court erred in viewing this document as a representative admission by the defendant, see Appx. A9-A11, rejecting Appx. B9, but went seriously astray in affirming on the alternate ground of Fed.R.Evid. 803(6), the business records exception to the hearsay rule.[3]

Exhibit B-110 is a claims analysis prepared by Inservco Insurance Services, a private consulting firm hired by the statutory liquidator after Sokolow was ousted from control of his companies. InServCo reviewed claims documents from the files of a corporation hired to process claims for AIBA. These claims were factual assertions filed by beneficiaries, Appx. A11, not business records of the companies. Neither the claimants nor even the company's claims analyst testified at trial. Exhibit B-110 is hearsay within hearsay with the meaning of Rule 805; it was not admissible unless each part conformed to an exception to the hearsay rule.

> The court below held:
> the NIBA members' claims were collected in the course of regularly conducted business of NIBA's original claims administrators. ...

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[3] The text of Rule 803(6) is in the Statutes Involved, above.

As to the claim adjustments made by Inservco, and summarized in Gov't Ex. B-110, we find that this data also falls within the business records exception. ... The claims adjustments made by Inservco were the same type of adjustments NIBA's third party administrators would have had to make if NIBA had stayed in business. ... Gov't Ex. B-110 was derived from Inservco's claims processing system and that these records were made and kept in Inservco's regular course of business.

Although the Inservco business records were derived in part from information provided by outside persons not under a business compulsion, the business records exception may still apply .... The beneficiaries were under a duty to submit accurate proof of claims in order to be entitled to payment, and subject to criminal and/or civil penalties for submitting fraudulent claims. ...

Inservco would then begin its own verification procedure. ...

In sum, we find that because the claims audit performed here was unique, the government properly established the admissibility of Gov't Ex. B-110 under

the business records exception to the hearsay rule.

Appx. A13-16; 91 F.3d at 403-04. The opinion below essentially reverses the basic principles of evidence law under which hearsay is presumed inadmissible. A document prepared by a private individual does not become the "business record" of a business, and thus admissible for the truth of the matters asserted therein, simply because it was received in the mail by a business, spot checked, and placed in a file. The error is aggravated by the fact that Inservco was no ordinary "business"; it was acting as part of a law enforcement effort, and the so-called "business record" allowed by the panel was of a kind expressly excluded by Fed.R.Evid. 803(8)(C). Compare Appx. A18-A20.

Trial Exhibit B-110, the Inservco summary of claims, was inadmissible hearsay under Rule 803(8)(C) because it represented the results of an investigation made pursuant to authority granted by law.[4] As the statutory liquidator put

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[4] Inservco was appointed to conduct its study by the state Insurance Department as part of the Department's exercise of its suspension and liquidation functions. CA3 App. A289. Such reports are never admissible against the defendant in a criminal case. Fed.R.Evid. 803(8)(C). The text of Rule 803(8)(C) is reproduced in the Statutes Involved, above.

it, Exhibit B-110 "is ... [b]asically, ... a listing by claimant of the claims they submitted against the estate." CA3 App. A347 (emphasis added). In other words, the claims summarized in Exhibit B-110 were made in adversarial proceedings. By the terms of the rule, such findings are admissible in civil cases, and "against the Government in criminal cases," Rule 803(8)(C), but never admissible against a criminal defendant.

A record excluded under this specific provision cannot be admitted under a more general rule, such as the business records rule, without completely obviating the policy judgment that Rule 803(8) was designed to implement. As the leading case holds, reports which are excluded by Rule 803(8) cannot be brought in the side door under Rule 803(6). United States v. Oates, 560 F.2d 45, 68-78 (2d Cir. 1977).

Other Circuits have found circumstances in which the direct holding of Oates does not apply, and thus have been able on occasion to distinguish it, and have pointed out that its dictum is too broad. See 2 McCormick on Evidence § 296, at 293-94 (4th ed. J.W. Strong 1992); 4 Weinstein's Evidence ¶803(8)-[04], at 803-289 to -296 (1996). But the decision of the Third Circuit below is a direct contradiction and rejection of the Second Circuit's impeccable logic. As Judge Weinstein's treatise acknowledges,

"Judges have not seen eye to eye in interpreting the exclusionary language in Rule 803(8)." Id. at 803-289. This Court should grant certiorari to resolve the conflict in the Circuits.

Rule 803(6) requires not only that records admissible under the business records exception be "collected in the course of regularly conducted business," Appx. A13, but also that the information be "transmitted by a person with knowledge." Rule 803(6). Nor does the opinion explain how self-serving statements of disputed claimants qualify under any hearsay exception.

This point is literally hornbook law. 2 McCormick on Evidence § 290, at 273 (4th ed. J.W. Strong 1992).[5] The

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[5] McCormick on Evidence states:

> **§ 290. Personal knowledge; all participants in regular course of business.**
>
> The common law exception for regularly kept records required that the entries have been made by one with personal knowledge of the matter entered or upon reports to the maker by one with personal knowledge. The entrant was required to be acting in the regular course of business, and if the information was supplied by another, that person also was required to be acting in the

other circuits agree: United States v. Warren, 42 F.3d 656 (D.C.Cir. 1994) ("[803(6)] allows admission of statements in such reports only if they reflect the maker's personal knowledge, or if they were reported to the maker ... by one who is himself acting in the regular course of business, and who has personal knowledge"); United States v. McIntyre, 997 F.2d 687, 699 (10th Cir. 1993) ("The essential component of the business records exception is that each actor is under a business duty or compulsion to provide accurate information."). Need-

(cont'd)

> **regular course of business.** ... The application of the regular course requirement to all participants in the process of requiring, transmitting and recording information was consistent with, indeed mandated by, the theory of the hearsay exception.
>
> * * *
>
> If any person in the process is not acting in the regular course of the business, then an essential link in the trustworthiness chain fails, just as it does when the person feeding the information does not have first hand knowledge.

(emphasis added; footnotes omitted).

less to say, the claimants were not acting in the regular course of anyone's business in making their statements.

The opinion below completely loses sight of this fact in asserting that "there was no loss of confrontation rights" in offering Exhibit B-110 as evidence against petitioner. Appx. A20. The crux of the problem with Exhibit B-110 is the source of the information on which Inservco worked, and there was no supporting testimony verifying the vast bulk of claims offered as evidence.

Under the rule endorsed by the court below, the Confrontation Clause would be said to be satisfied merely by introducing police reports against a criminal defendant, without having the witnesses whose statements are incorporated into those police reports be required to testify, without giving the defendant the opportunity to confront his accusers, simply because the police made and kept those reports.

This error cannot have been harmless. The entire prosecution rested on the theory that Sokolow materially misrepresented his plan as providing full coverage when actually he so under-funded it that it was incapable of paying valid claims. In the prosecutor's jury argument, Exhibit B-110 was the critical evidence of Sokolow's intent to defraud. Aplt.Supp.CA3 App. ("CA3 ASA") 1.

The decision below is contrary to the law in other Circuits and to the

basic principles of the Federal Rules of Evidence. For all these reasons, this Court should grant this petition for certiorari and reverse the judgment of the United States Court of Appeals for the Third Circuit.

2. The decision below conflicts with those of two other Circuits in finding harmless in a federal mail fraud prosecution the government's reliance on a state court judicial opinion, later rejected by higher authority, as evidence of the unlicensed status of the petitioner's health benefits plan.

Certiorari should also be granted to resolve the splits in the Circuits concerning the materiality in federal mail fraud cases of evidence purporting to show that a defendant's business was not licensed, as required under state law. That issue came up in dramatic form in this case, through the admission of an interlocutory state court appellate opinion, the holding of which ironically was disavowed by higher state court authority after petitioner's federal trial. Both aspects of the trial court's ruling in this case, upheld by the court below, would have been reversible error in other Circuits.

Over continuing defense objection, CA3 App. A557-59, Pennsylvania Deputy Insurance Commissioner Chronister read to the jury most of an interlocutory ruling

of the Pennsylvania Commonwealth Court, denying an injunction against the May 1989 suspension of petitioner's operation.[6] This opinion states, inter alia, "that the petitioners' business operation clearly was not a valid ERISA employment benefit plan," that "NIBA was a means by which its principal, Craig Sokolow, was marketing insurance, without the benefit of licensed company status, while purporting to be a valid ERISA plan, such that state licensing would not be necessary," and that "Since the petitioners conducted business in Pennsylvania as an insurer without a license, it was appropriate for the Commissioner to intervene and take the drastic action of suspension." CA3 App. A559-61 (as originally punctuated at A1193); see CA3 App. A1191-94 (Exhibit B-139, referred to below as "the Judge Colins opinion"). The defense motion for mistrial, CA3 App. A565, was denied. CA3 App. A568-70.

The court below concluded that admission of this testimony was not an abuse of discretion, and, in the alternative, that any error was rendered harmless by a cautionary instruction. Appx.

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[6] See PIBA, et al. v. Comw. of Penna. Insurance Dept., No. 131 M.D. 1989 (Aug. 31, 1989). A copy was Gov't Exh. B-139 at trial.

A20-24.[7] Recently, the Eighth Circuit held identical testimony improper in a federal prosecution and inadmissible under Fed.R.Evid. 403:

> We do not see the relevance of [the defendant's] agent/broker license suspension to the mail fraud or wire fraud counts in the insurance fraud case. Even if that evidence was marginally relevant, moreover, we believe that its probative value was far outweighed by its potential for generating unfair prejudice against [him].

United States v. Sandow, 78 F.3d 388, 391 (1996).

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[7] Departing from its initial determination that the matter of licensure was immaterial, CA3 App. A94, the trial court ruled, without elaboration, that the opinion's probative value outweighed its prejudicial effect. CA3 App. A608. Indeed, the court had earlier recognized that such testimony would only serve to "pa[int] [Mr. Sokolow] with a black brush." CA3 App. A94. The trial court retreated substantially from its initial decision to exclude it, CA3 App. A93-95, and allowed the testimony as "historical background," CA3 App. A954, a marginally important purpose at best, while its judicial source and comments on contested factual issues rendered it exceptionally prejudicial.

A settlement resolved the particular suit in which the interlocutory opinion that was read to the jury during petitioner's trial was rendered. But in related litigation the Commonwealth Court, sitting en banc, later ruled that NIBA was an ERISA-regulated Multi-Employer Welfare Arrangement (MEWA) and not an insurance entity operating under Pennsylvania state law; the state supreme court affirmed this judgment. Pennsylvania Ass'n of Life Underwriters v. Foster, 165 Pa. Cmwlth. 596, 645 A.2d 907, 911-12 (1994) (en banc),[8] aff'd without op., 542 Pa. 544, 668 A.2d 1113 (1995) (per curiam). This authoritative contradiction of Judge Colins' interlocutory ruling would itself provide grounds for a new trial in the Sixth Circuit. See United States v. Garland, 991 F.2d 328, 335 (6th Cir. 1993).

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[8] The Commonwealth Court's unanimous finding that petitioner's association was not an insurance company under state law calls into question the correctness of the Department's actions in suspending and liquidating NIBA. See id. at 911: "[W]e conclude that AIBA was not an insurance company, association, or exchange within the meaning of Section 605 [of the Insurance Department Act] as it existed prior to the 1992 amendment" (emphasis original).

The unlicensed insurer issue arose a second time at trial during the testimony of the statutory liquidator. Over objection, CA3 App. A313, the court allowed this witness to reiterate that NIBA improperly operated without a license. CA3 App. A314, A346, A367. NIBA's unlicensed status was not part of the charged fraud because petitioner never claimed to be licensed. CA3 App. A93.[9] Despite

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[9] In closing argument, the prosecutor described the indicted crime:

> The heart of the fraud is really the fact that this was a plan that was marketed ... as a fully-insured health insurance plan and people were asked to pay premiums for that coverage. ....
>
> The specific language in the charging part of the mail fraud count is: "That the defendant devised and intended to devise a scheme and artifice to defraud members of PIBA, NIBA and AIBA involved in the group health benefits plans of health benefits premiums and their right to fully insured health benefits coverage; and who obtained such money and property by means of false, fraudulent pretense, representations and promises and concealment of material facts." That is what is really the heart of the fraud in this

this, the government emphasized that NIBA was not licensed to sell insurance (with the clear implication that he was required to be so licensed), as a concrete (albeit extraneous) form of misconduct to which the jury could cling.

The unfairly prejudicial effect of this evidence is demonstrated by the deliberating jury's request to see the opinion. CA3 App. A953-54. Although the court did not allow the jury to have a copy, it did not instruct them to disregard it, but only that they were not bound by Judge Colins' comments. CA3 App. A954.

The government repeatedly referred to the absence of licensing during its case and in closing argument. A313-20, A527-28; CA3 ASA 1, CA3 ASA 3. Moreover, the prosecution case began with six days of testimony, over objection, from 17 NIBA members who were permitted to tell of personal, emotional and financial turmoil which resulted from their unpaid claims. CA3 App. A104-05, 119, 155-56, 204, 211, 234, 238, 202-03, 273. Three others testified similarly later. The prosecutor's closing argument referred to one "victim" by name eight times and the

_____(cont'd)

case.
CA3 A933. Licensure vel non was not material to this charge.

fact that he was a quadriplegic three times. CA3 ASA 1, 8. Defense counsel objected. CA3 ASA 11. The prejudice petitioner suffered from the improper admission of the state judicial opinion was compounded by the allowance of this additional form of irrelevant and unfairly prejudicial evidence.

Contrary to the ruling below, the trial court's supplemental instruction that Judge Colins' opinion was "just that, an opinion," CA3 App. A1203, was insufficient to cure the prejudice, since whether or not it was "just an opinion," it was, after all, a judicial opinion that petitioner was guilty of misrepresenting his organization and operating illegally. The final instruction did not go nearly far enough to erase this unfair influence. Certiorari must be granted to reconcile the decision below with the law in other circuits, and to clarify the standard of unfair prejudice in federal criminal trials for mail fraud.

3. The unprecedented opinion below eliminates the requirement of 18 U.S.C. § 982 that a criminal money laundering forfeiture attaches only to what the government alleges and the jury finds is the "property ... involved" in the offense, or other property traceable to that original, tainted property.

With respect to the validity of the criminal forfeiture, the decision below relies solely on the terms of the Rules of Procedure in rejecting the argument that 18 U.S.C. § 982, by its terms, requires the identification of specific property to be forfeited, and that a verdict directing forfeiture of an amount of money, rather than of specified property (which may have that value), is unauthorized. Appx. A52-53. An indictment and verdict slip which allege only the extent and not the identity of the property may comply with the literal terms of Fed.R.Crim.P. 7(c)(2) and 31(e), but in doing so they do not establish a violation of § 982(a).[10]

The "property" that was "involved in" the charged § 1957 offenses, which should have been specified in the indict-

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[10] The pertinent text of 18 U.S.C. § 982(a), both before and after its 1988 amendment, appears in the Statutes Involved.

ment and verdict sheet, was the actual currency or checks deposited or withdrawn, and the "property traceable to such property" would be either the funds left in the account into which that original property was deposited, or the property purchased with the forfeitable property withdrawn (or for which that property was later exchanged). A dollar amount, stated in the abstract, does not identify any "property." Cf. United States v. $814,254.76 in U.S. Currency, 51 F.3d 207 (9th Cir. 1995) (Banamex funds in a bank account which did not contain any of the money laundered or proceeds of money laundering did not constitute money "involved in" money laundering or "traceable to" such property under § 981, the civil counterpart to § 982). Except in the real estate counts, there was a complete failure to comply with the requirements of 18 U.S.C. § 982(a).

By failing to require that the indictment specify or that the jury identify specific existing property which was either the original property "involved in" the offense, or which was "traceable to" that property, the panel upholds the improper obtaining, in this case, of what was not so much a forfeiture verdict as a money judgment against the defendant. However, as David B. Smith, a leading authority, states, this kind of ruling:

> ignores the basic nature of a forfeiture, whether criminal or civil. ... [E]ven in personam forfeitures are still forfeitures; they are not to be confused with fines or other personal money judgments.

2 D. Smith, Prosecution and Defense of Forfeiture Cases ¶13.02, at 13-36 (1996). Accord, United States v. Ripinsky, 20 F.3d 359, 365 n.8 (9th Cir. 1994); United States v. Meyers, 432 F.Supp. 456, 461 (W.D.Pa. 1977). The decision below is at odds with this Court's understanding of the requirements of criminal forfeiture laws: "Congress established the large fines in [21 U.S.C.] § 848 in an effort to deprive big-time drug dealers of some of their enormous profits, which often cannot be traced directly to their crimes for forfeiture purposes." Garrett v. United States, 471 U.S. 773, 794 (1985) (emphasis added).[11]

This Court should grant certiorari to address and correct the Third Circuit's construction of 18 U.S.C. § 982, which erases the statutory language

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[11] The decision below thus allows to be done indirectly what another panel of the Third Circuit, in the same month, barred from being done directly. United States v. Voigt, 89 F.3d 1050, 1085-86 (3d Cir. 1996).

and thereby raises a fundamental issue concerning the nature of a federal criminal forfeiture.

4. The decision below conflicts with express legislative history and all authority in holding that the corpus of the funds laundered can also constitute the "proceeds" of money laundering under pre-1988 law.

The court below rejected petitioner's ex post facto argument against the forfeiture of all the funds involved in the Count 126 transaction by announcing an unprecedented interpretation of 18 U.S.C. § 982, as it stood prior to its 1988 amendment. Appx. A55-56. The transaction covered by that Count occurred on October 4, 1988. The amendment to the forfeiture statute, however, became effective on November 18, 1988.

Under the interpretation adopted below, equating "gross receipts" with "the corpus of the funds laundered" when the defendant conducts a $10,000 transaction with the proceeds of his own offense, the 1988 amendment would be rendered meaningless. The court of appeals concedes that its interpretation is directly contrary to the legislative history, and notes the absence of case law. The reason for this should be clear: such prosecutions have always

been thought impossible under the plain statutory language.

As the Department of Justice's own Prosecution Manual states:

> As originally enacted ..., § 982(a) provided that only property representing the 'gross receipts' of violations ... were forfeitable. The legislative history clearly stated that 'gross receipts' meant 'only the commission earned by the money launderer ..., and not the corpus laundered itself.' Thus in the case of property involved in Title 18 money laundering offense, the original statutes authorized the forfeiture only of the property the launderer was entitled to keep as his fee for his laundering service, not the property he was given to launder. This limitation rendered § ... 982 virtually useless in cases involving ... § 1957 offenses, and there were few if any cases brought ....

Money Laundering Federal Prosecution Manual, at 303 (Feb. 1992). Accord, 2 I. Comisky, L. Feld & S. Harris, Tax Fraud and Evasion: Money Laundering, Asset Forfeiture, Sentencing ¶13.01[1][a], at 13-6 (1994 & 1996 Supp.), citing U.S. Atty. Man. 9-105.940; 1 D. Smith, supra, ¶5.01[1], at 5-8 n.17 (1996) (questioning

decision below in this case); 1 J. Villa, Banking Crimes § 8.11[3][a], at 8-102 to -103 (1996).

The court below held that where the funds "laundered" are the proceeds of the defendant's own offense, as here, these funds are the "gross receipts." That analysis is fundamentally flawed; while such funds may be the "gross receipts" of the fraud offense, they are not the "gross receipts" of the money laundering offense, which is the only amount the pre-1988 statute authorized to be forfeited. There is no basis in the statutory language for the panel's unprecedented and inventive extension of this since-amended penalty. Adherence to legality and lenity require the criminal forfeiture on Count 126 to be vacated.

Because of the subsequent amendment, this issue may not warrant the Court's full scope of review. If the Solicitor General does not confess error on this point, however, the Court should at least grant certiorari, summarily reverse, and remand the forfeiture judgment on Count 126 with directions to reduce the judgment by $125,000.

CONCLUSION

For the foregoing reasons, petitioner CRAIG B. SOKOLOW prays that this Court grant his petition for a writ of certiorari, reverse the judgment below, and remand for a new trial. At the least, the Court should grant certiorari and reverse the judgments of criminal forfeiture.

Respectfully submitted,

By: PETER GOLDBERGER
Attorney for Petitioner

December 16, 1996.

APPENDIX A

UNITED STATES of America
v.
Craig B. SOKOLOW, Appellant.

Nos. 95-1367, 95-1292.
United States Court of Appeals,
Third Circuit.
Argued Jan. 22, 1996.
Decided July 26, 1996.

91 F.3d 396

------- **Page 91 F.3d 399 follows** -------

John Rogers Carroll, Johanna E. Markind, Carroll & Carroll, Philadelphia, PA, Peter Goldberger (argued), Anna M. Durbin, Pamela A. Wilk, Ardmore, PA, for appellant.

Michael R. Stiles, United States Attorney, Walter S. Batty, Jr., Chief of Appeals, Joseph T. LaBrum, III (argued), Maryanne Donaghy (argued), Sarah L. Grieb, Assistant United States Attorneys, Philadelphia, PA, for appellee.

Before: MANSMANN and SCIRICA, Circuit Judges, and RESTANI, Judge, Court

------- **Page 91 F.3d 400 follows** -------

of International Trade.*

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

ORDER

MANSMANN, Circuit Judge.

It is hereby ORDERED that the opinion dated April 18, 1996, in the above case [81 F.3d 397] is hereby vacated.

It is further ORDERED that the petition for panel rehearing filed by appellant in the above entitled case having been substituted [sic] to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, is denied.

It is further ORDERED that the Clerk shall file the enclosed opinion.

OPINION OF THE COURT

RESTANI, Judge.

Defendant Craig B. Sokolow ("Sokolow") appeals from his conviction in the United States District Court for the Eastern District of Pennsylvania following a two month jury trial. On March 18, 1994, Sokolow was convicted of 107 counts of mail fraud in violation of 18 U.S.C. § 1341 (1988), 17 counts of money laundering in violation of 18 U.S.C. § 1957 (1988), and one count of criminal forfeiture in violation of 18 U.S.C. § 982 (1988). Following several sentencing hearings, the district judge sentenced Sokolow to 92 months in prison, to be followed by three years supervised release, and ordered a $50,000 fine, $6200 in special assessments, $690,246.34 in restitution, and the forfeiture of

$2.1 million. On appeal, defendant challenges both his conviction and sentencing. For the reasons stated herein, we will affirm the conviction, sentencing, and the order of forfeiture, but remand for reconsideration of the restitution order.

I. BACKGROUND

The events leading to Sokolow's indictment and subsequent conviction occurred between May 1, 1987 and July 23, 1990. Sokolow, an attorney and licensed insurance agent, offered health benefits plans to the public in Pennsylvania and several other states through a series of corporations that he established and controlled, but primarily through the National Independent Business Association, Inc. ("NIBA").[1] The plans were marketed to small business employers, their employees, and their families.

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[1] In 1984, Sokolow began offering his health benefits plan through the Pennsylvania Independent Business Association, Inc. ("PIBA"). NIBA was established as a successor to PIBA in 1987. In 1988, NIBA was succeeded by the American Independent Business Alliance, Inc. ("AIBA"), the association existing until the time of liquidation on February 15, 1990. For convenience, "NIBA" will be used throughout the opinion to refer to the various corporations.

Association Insurance Marketing, Inc. ("AIM"), a corporation established and controlled by Sokolow, served as the primary marketing arm of NIBA. Through AIM, Sokolow received commissions on all premiums received for the sale of NIBA policies.

Prior to May 1987, NIBA members were fully insured by NIBA's group insurance contract with World Life and Health Insurance Company ("World Company"). On May 1, 1987, Sokolow replaced World Life with Independence Blue Cross and Pennsylvania Blue Shield to administer and process NIBA's health care claims. Sokolow purchased stop-loss coverage from Blue Cross, whereby NIBA assumed responsibility for the payment of NIBA members' medical care claims up to the first $25,000. Blue Cross would pay any remaining claims in excess of $25,000. The indictment charged that Sokolow falsely represented to the public that NIBA was fully-insured by Blue Cross, when, in fact, it was a self-funded plan, thus defrauding members of their premiums. In addition, Sokolow allegedly used the Blue Cross logo on marketing and billing materials, in violation of NIBA's agreement with Blue Cross, to foster the impression that NIBA was the equivalent of a Blue Cross fully-insured health benefits plan.

On June 30, 1988, Blue Cross terminated its service plan with NIBA when

Sokolow failed to pay approximately $2 million in

------- **Page 91 F.3d 401 follows** -------

claims for which Blue Cross sought reimbursement. Sokolow then contracted with another company for higher stop-loss coverage that required NIBA to pay the first $50,000 of a member's medical care claims. The indictment alleged that Sokolow again misrepresented that NIBA was fully insured by the new coverage, when, in fact, it was self-funded.

After receiving complaints concerning NIBA's claims administration in late 1988, the Pennsylvania Insurance Department (the "Department") began to investigate NIBA's operations. The Department determined that Sokolow had been operating NIBA as an illegal, unlicensed insurer in Pennsylvania. Sokolow objected to the Department's inquiries on the basis that NIBA was a Multi-Employer Welfare Arrangement ("MEWA") that could file a benefits plan under ERISA and, thus, was not subject to state regulation.[2] The Department disagreed with

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[2] Although Sokolow represented to the Department that he *could* have filed the NIBA plan under ERISA, the evidence at trial indicated that Sokolow represented to Virginia and Maryland insurance regulators that the NIBA health plan was, in fact, filed as an ERISA plan with the United States Department of Labor, and,

Sokolow's contentions and, on May 2, 1989, suspended NIBA's operations. On August 31, 1989, the Commonwealth Court of Pennsylvania ruled that NIBA did not constitute a valid MEWA plan, but was a commercial enterprise "marketing insurance, without the benefit of a licensed company status, while purporting to be a valid ERISA plan, such that state licensing would not be necessary."[3] Appellant's App. [hereinafter "App."] at 1193. Consequently, NIBA was ordered liquidated by the commonwealth court on February 15, 1990.

Sokolow collected more than $34 million in premiums from NIBA plan members who were allegedly defrauded by Sokolow during the period covered by the

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thus, not subject to state regulation. Trial testimony established, however, that Sokolow never filed the NIBA plan with ERISA for the years 1987 through 1990.

[3] For purposes of determining insurance agents' liability, a later *en banc* ruling of the commonwealth court found that NIBA was a MEWA and not an insurance entity operating under Pennsylvania state law. *Pennsylvania Ass'n of Life Underwriters v. Foster*, 165 Pa.Cmwlth. 596, 645 A.2d 907, 911-12 (1994) (en banc), *aff'd without op.*, 542 Pa. 544, 668 A.2d 1113 (1995) (per curiam).

indictment. The indictment alleged that Sokolow converted approximately $4 million of the premiums for his personal benefit. He received $2,239,575.67 in commissions through AIM and two other related insurance companies[4] ($1,837,-152.30 of those commissions went to AIM) and $1,806,259.23 in salary, officer's loans, and other disbursements. These monies were deposited into AIM and NIBA accounts. The indictment alleged that Sokolow laundered these funds through a number of bank and brokerage accounts, as well as real property and mortgages.

The jury trial commenced on January 10, 1994, and concluded on March 18, 1994, with the return of guilty verdicts on all counts considered by the jury. Sentencing proceedings were held on January 6 and 11, and February 6, 1995, during which sentencing issues were argued, and evidence of forfeiture, loss calculations, and restitution was presented. On March 14, 1995, the district court filed three separate Memorandum Opinions and Orders, inter alia, determining the Sentencing Guidelines calcula-

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[4] The related companies were Sokolow & McMillan, and Sokolow, McMillan & O'Leary, two "in-house" insurance agencies of which Sokolow was a partner, and which sold NIBA health benefits plans.

tions, and ordering the restitution and forfeiture obligation. Following entry of judgment, Sokolow filed this timely appeal challenging both his conviction and sentence.

II. CHALLENGES TO THE CONVICTION

A. *Evidentiary Challenges*

Sokolow challenges three evidentiary rulings made by the district court. Sokolow claims that the district court (1) erred in admitting into evidence Government Exhibit B-110 ("Gov't Ex. B-110"), a summary of unpaid insurance claims of NIBA members; (2) improperly allowed evidence of NIBA's alleged operation as an unlicensed insurance

------- **Page 91 F.3d 402 follows** -------

company; and (3) abused its discretion in admitting irrelevant and highly prejudicial victim impact testimony. To the extent the district court's admission of evidence was based on an interpretation of the Federal Rules of Evidence, our standard of review is plenary. *See United States v. Furst*, 886 F.2d 558, 571 (3d Cir.1989), *cert. denied*, 493 U.S. 1062, 110 S.Ct. 878, 107 L.Ed.2d 961 (1990). Our review of a district court's ruling to admit or exclude evidence, if premised on a permissible view of the law, however, is only for an abuse of discretion. *See id.*; *see also United States v. Versaint*, 849 F.2d 827, 831 (3d Cir.1988). We will address each of Sokolow's evidentiary challenges in turn.

1. *Government Exhibit B-110*

Sokolow contends that Gov't Ex. B-110 is inadmissible hearsay. Gov't Ex. B-110 is a compilation and summary of over $7 million in unpaid insurance claims of NIBA members. The document was prepared for the Department in July 1992 by Inservco, a third-party administrator hired to adjust the unpaid claims after the commonwealth court ordered the liquidation of NIBA. Originally, NIBA members' claims were documented in the course of regularly conducted business by NIBA's third party administrators -- National Benefits Corp., Insurance Benefits Services ("IBS"), and Independent Insurance Administrators ("IIA"). The companies processed NIBA claims and kept records on behalf of NIBA, which Sokolow later authorized to be turned over to the Department's Statutory Liquidator in connection with NIBA's liquidation. As custodian of the NIBA plan records, the Statutory Liquidator made the records available to Inservco for the adjustment of unpaid claims.

Over Sokolow's objection, the district court admitted the exhibit as an admission by Sokolow, under Federal Rule of Evidence 801(d)(2)(C).[5] The district court reasoned:

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[5] Rule 801(d)(2)(C) provides that

> [a] statement is not hearsay if ... [t]he statement is offered against

> Inservco summarized information held by the Statutory Liquidator, who in turn obtained the information from another administrator hired by Sokolow. Each entity that held the information had the express authorization of [Sokolow]. As such, Exhibit B-110 is a party admission....

United States v. Sokolow, No. 93-394-01, 1994 WL 613640, at *5 (E.D.Pa. Nov. 1, 1994). We disagree with the district court's reasoning.

Rule 801(d)(2)(C) specifically excludes from the definition of hearsay any statements used against a party which were made by another person authorized by the party to make a statement concerning the subject. Fed.R.Evid. 801(d)(2)(C); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1198 (3d Cir.1993). We find, and the government admits, that Inservco's adjustments to the NIBA members' claims were not "done with Sokolow's consent or at his direction," and, thus, are not admissions by Sokolow. *See* Appellee's Br. at 23. The government continues to assert, however, that the

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> a party and is ... a statement by a person authorized by the party to make a statement concerning the subject.

Fed.R.Evid. 801(d)(2)(C).

collection of these claims by NIBA's third-party administrators constitutes an admission by Sokolow, and are, thus, not hearsay. This argument is untenable. Rule 801(d)(2)(C) requires that the declarant be an agent of the party-opponent against whom the admission is offered. *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3d Cir.1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 1015, 134 L.Ed.2d 95 (1996). We find that neither the underlying claims submitted by NIBA insurance beneficiaries to NIBA's third-party administrators nor Sokolow's subsequent release of these records to the Department constitutes an admission by Sokolow. Thus, Gov't Ex. B-110 is hearsay because the entries of NIBA members' claims, whether or not adjusted by Inservco, were written out-of-court statements offered to prove not merely the existence but the genuineness of the claims, and ultimately, the underfunding of Sokolow's enterprise.

We now turn to whether Gov't Ex. B-110 falls within one of the exceptions to the hearsay exclusion. The government argues that Gov't Ex. B-110 is admissible under the business

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records exception to the hearsay rule.[6]

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[6] Pursuant to Rule 803(6), the following are not excluded by the hearsay rule even though the declarant is available as a

This exception allows the admission of hearsay documents provided a foundation is laid by "the custodian or other qualified witness" that:

> (1) [t]he declarant in the records had personal knowledge to make accurate statements; (2) the declarant recorded the statements contemporaneously with the actions that were the subject of the reports; (3) the declarant made the record in the regular course of the

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witness:

> **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Fed.R.Evid. 803(6).

business activity; and (4) such records were regularly kept by the business.

United States v. Pelullo, 964 F.2d 193, 200 (3d Cir.1992).

We find that Gov't Ex. B-110 is admissible under the business records exception. Contrary to Sokolow's contentions, the NIBA members' claims were collected in the course of regularly conducted business of NIBA's original claims administrators. IIA initially received NIBA plan member information from IBS, a prior third party administrator, with Sokolow's consent and authorization. Pursuant to the liquidation order, Sokolow specifically authorized the IIA to "release any and all data base information as required concerning [NIBA] on the in-house history tapes and claims system to the [Department]." App. at 826. Joseph DiMemmo testified that as the representative of the Statutory Liquidator, he took custody of all NIBA records. We find that a clear chain of custody and foundation for this data, upon which Inservco based its claims adjustment, was established.

As to the claim adjustments made by Inservco, and summarized in Gov't Ex. B-110, we find that this data also falls within the business records exception. As a third party administrator, Inservco contracted with the Department to administer NIBA health insurance claims. The

claims adjustments made by Inservco were the same type of adjustments NIBA's third party administrators would have had to make if NIBA had stayed in business. Margaret Lee attested to the authenticity of Gov't Ex. B-110 and laid the foundation for its admission. Lee testified that Gov't Ex. B-110 was derived from Inservco's claims processing system and that these records were made and kept in Inservco's regular course of business.

Although the Inservco business records were derived in part from information provided by outside persons not under a business compulsion, the business records exception may still apply "[i]f the business entity has adequate verification or other assurance of accuracy of the information provided by the outside person." *See United States v. McIntyre*, 997 F.2d 687, 700 (10th Cir.1993), *cert. denied*, 510 U.S. 1063, 114 S.Ct. 736, 126 L.Ed.2d 699 (1994); *see also United States v. Console*, 13 F.3d 641, 657-58 (3d Cir.1993) (under Rule 803(6), person transmitting recorded information not required to be under business duty to provide accurate information if "standard practice was to verify the information provided.") (internal quotes omitted), *cert. denied*, --- U.S. ----, 114 S.Ct. 1660, 128 L.Ed.2d 377 and --- U.S ----, 115 S.Ct. 64, 130 L.Ed.2d 21 (1994). In this case, a proof of claim procedure was utilized whereby the beneficiaries would

reverify their claims and submit supporting provider documentation through the Department. The beneficiaries were under a duty to submit accurate proof of claims in order to be entitled to payment, and subject to criminal and/or civil penalties for submitting fraudulent claims. *See* 18 Pa. Cons. Stat. § 4117 (criminal/civil liability for insurance fraud).

Inservco would then begin its own verification procedure. Ms. Lee testified that Inservco set up the processing of the proof of claim forms submitted by each claimant. Inservco

------- **Page 91 F.3d 404 follows** -------

received database information from NIBA's prior third party administrators regarding NIBA members. With this information placed into Inservco's claims processing system, Inservco verified the information submitted on the proof of claim forms. Ms. Lee and her staff evaluated each proof of claim for correct benefits, according to NIBA guidelines and benefit plans, and submitted a notice of explanation of benefits and a notice of claim evaluation to each claimant. There were roughly 4,600 policy holder claims against the NIBA estate. Ms. Lee audited between 10 and 30 percent of each benefit amount less than $1,000. Also, Ms. Lee, in coordination with the statutory liquidators, audited any claim that had a benefit amount of over $1,000.

In sum, we find that because the claims audit performed here was unique,

the government properly established the admissibility of Gov't Ex. B-110 under the business records exception to the hearsay rule.

Defendant asserts, however, that the methods and circumstances under which Inservco prepared the summary of claims were untrustworthy and unreliable. Sokolow argues that many claims were not checked for pre-existing conditions, double submissions, or the timeliness of the claims. We disagree. Inservco adjusted the claims according to NIBA policy guidelines, and these adjustments were subject to committee review and oversight by the Department. Final approval of the claim adjustments was made by the Department. Although the adjustments made by Inservco did not take into account the timeliness of claims, trial testimony indicated that this information could not be determined from the submissions made to the Department. Further, Sokolow offers no specific evidence that the claims were not properly inspected by Inservco. Much of the evidence indicates the contrary. In any event, such questions go to the weight to be given to Gov't Ex. B-110, and not its admissibility.

Finally, Sokolow claims that Gov't Ex. B-110 is a public report under Federal Rule of Evidence 803(8)(C),[7] and, thus,

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[7] Rule 803(8)(C) excepts from the hearsay

should be excluded under the rationale set forth in *United States v. Oates*, 560 F.2d 45 (2d Cir.1977). There the court held that, "police and evaluative reports not satisfying the standards of [Federal Rules of Evidence] 803(8)(B) and (C) may not qualify for admission under [Rule] 803(6) or any of the other exceptions to the hearsay rule." *Id.* at 77. Generally, a public report consisting of "factual findings resulting from an investigation made pursuant to authority granted by law," is not admissible against a criminal defendant under Rule 803(8)(C). We agree with Sokolow that Gov't Ex. B-110 contains some indicia of a public report under Rule 803(8)(C). In

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rule, even though the declarant is available as a witness:

> **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth, ... in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed.R.Evid. 803(8)(C).

processing NIBA members' claims, Inservco was performing a fact-finding function and acting essentially as the agent of the Department, which was required to liquidate NIBA pursuant to state law. We disagree, however, with Sokolow's contention that the findings made by the Department, *i.e.* Inservco's adjustments, were inadmissible under the Oates rule.

Criticizing *Oates* as an unduly broad interpretation of Rule 803(8), many courts have declined to import the limitations of Rule 803(8)(B)[8] and (C) into other hearsay exceptions. *See, e.g., United States v. Picciandra*, 788 F.2d 39, 44 (1st Cir.) (upholding admission of DEA report against criminal

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defendants under Rule 803(5) (past recol-

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[8] Rule 803(8)(B) excepts from the hearsay rule, even though the declarant is available as a witness:

> **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth, ... matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel.

Fed.R.Evid. 803(8)(B).

lection recorded)), *cert. denied*, 479 U.S. 847, 107 S.Ct. 166, 93 L.Ed.2d 104 (1986); *United States v. Metzger*, 778 F.2d 1195, 1201 (6th Cir.1985) (declining to read Rule 803(8)(C) limitations into Rule 803(10) (absence of public record or entry)), *cert. denied*, 477 U.S. 906, 106 S.Ct. 3279, 91 L.Ed.2d 568 (1986). Although we have not specifically addressed this issue,[9] the Seventh and Tenth Circuits have held that Rule 803(8)(C) does not compel the exclusion of documents properly admitted under Rule 803(6) where the author testifies. *See United States v. Hayes*, 861 F.2d 1225, 1230 (10th Cir.1988); *United States v. King*, 613 F.2d 670, 672-73 (7th Cir. 1980).

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[9] In *United States v. Wright-Barker*, 784 F.2d 161, 173 (3d Cir.1986), we declined to address the applicability of the *Oates* rule to the admission of a Coast Guard report against criminal defendants under Rule 803(6), the business records exception. Even assuming inadmissibility, we found any error to be harmless. *Id.* We also noted the many exceptions to the *Oates* rule, such as the admission of law enforcement reports under Rule 803(6) where the author is available to testify at trial. *Id.* at 173 n.12. We declined, however, to decide the appropriateness or applicability of such exceptions. *Id.*

The *Hayes* court stated that the *Oates* rule does not apply in such circumstances "because such [investigator] testimony protects against the loss of an accused's confrontation rights, the underlying rationale for Rule 803(8) and the basis of the court's concern in Oates." 861 F.2d at 1230 (citation omitted). We reach the same conclusion here.

Here, Margaret Lee, the Inservco employee who supervised the claims adjustments, testified and was cross-examined at some length. Lee personally audited many of the submitted claims and stated that Gov't Ex. B-110 represented the results of Inservco's processing of the NIBA members' claims. We find that the circumstances surrounding the preparation of Gov't Ex. B-110 were probed and there was no loss of confrontation rights. Thus, Gov't Ex. B-110 was properly admissible under the business records exception of Rule 803(6), and we will affirm on that basis.

2. *Evidence of NIBA's Non-Licensure*

At trial, the district court permitted the reading into evidence of portions of a ruling made by the Commonwealth Court of Pennsylvania upholding the NIBA suspension order entered by the Department.[10] Denying Sokolow's motion to

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[10] Relevant excerpts read as follows:

> The activities conducted by [NIBA] clearly indicate to the Court as a

strike, the district court ruled that "the probative value [of the opinion] outweigh[ed] the prejudicial value." App. at 608. In addition, various testimony regarding the non-licensure of NIBA was permitted to be addressed.

Sokolow asserts that the district court erred in admitting this evidence. He argues that (1) the allegations of violations of state law were confusing and unduly prejudicial, (2) NIBA's

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> matter of fact and law that [NIBA's] business operation clearly was not a valid ERISA employment benefit plan.
>
> ....
>
> The Court finds that NIBA was a means by which its principal[,] Craig Sokolow[,] was marketing insurance without the benefit of licensed company status while purporting to be a valid ERISA plan, such that state licensing would not be necessary.
>
> ....
>
> Since [NIBA] conducted business in Pennsylvania as an insurer without a license, it was appropriate for the Commissioner to intervene and take the drastic action of suspension.

App. at 560-61, 1193 [hereinafter "Judge Colins's opinion"].

alleged non-licensure was not an element of the mail fraud scheme alleged in the indictment, (3) prejudicial effect is highlighted by the fact that the deliberating jury requested Judge Colins's opinion, and (4) the groundlessness of Judge Colins's opinion is supported by an en banc decision in a related case by the commonwealth court, which found NIBA was a MEWA and not an insurance entity under state law. *See supra* note 3.

We find that the district court did not abuse its discretion in admitting this evidence. Under Federal Rule of Evidence 403, "[relevant] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed.R. Evid. 403. According to the government, the evidence of non-licensure and the reading

------- **Page 91 F.3d 406 follows** -------

of Judge Colins's opinion was for the purpose of providing background information regarding the suspension and liquidation of NIBA. The non-licensure of NIBA was a factual allegation in the indictment which would demonstrate the nature of the fraud scheme and show the factual predicate for NIBA's suspension and liquidation.

Sokolow asserts that the evidence of non-licensure was unduly prejudicial and confusing, as evidenced by the jury's

request for Judge Colins's opinion. We disagree. In responding to the jury's request, the district judge submitted the following instruction, agreed to by the parties, rather than the requested opinion:[11]

> [Judge Colins's opinion] was referred to in the evidence to give a historical background of the proceedings. The opinion of Judge Collins [sic] is just that, an opinion. Judge Collins [sic] was not a witness to the facts. You have seen and heard the witnesses. You must make your decision on the basis of the witnesses[']testimony, exhibits relating to facts and the stipulations of counsel -- pursuant to my instructions on the law.

App. at 1203. We find that any prejudicial effect was remedied by this instruction. Additionally, as indicated, Judge Colins's ruling formed the basis for the liquidation of NIBA, and although non-licensure was not an element of the mail fraud or money laundering charges, it was a necessary factual predicate to the mail fraud scheme. Sokolow claimed to have

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[11] Sokolow's counsel, although agreeing to the instruction, continued his objection to the admissibility of Judge Colins's opinion.

created a valid health benefits plan filed with the Department of Labor and operating under ERISA, when in fact, no such filing was ever made. Accordingly, we find the district court did not abuse its discretion in admitting evidence of NIBA's non-licensure.[12]

3. *Victim Impact Testimony*

Sokolow asserts that the district court abused its discretion in permitting

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[12] Sokolow also contends that the district court's ruling on this issue amounted to collateral estoppel against him. *See United States v. Pelullo*, 14 F.3d 881, 897 (3d Cir.1994) (holding that defendant's prior conviction by jury for wire fraud could not be used as collateral estoppel to establish predicate act for violation of RICO in trial before second jury). Sokolow's claim is unavailing. The district court denied the government's motion *in limine* to preclude re-litigation of whether NIBA was an unlicensed insurer or qualified as a MEWA under ERISA. Further, as indicated, NIBA's non-licensure was a factual allegation in the mail fraud scheme charged in the indictment. The government established at trial that NIBA was neither properly filed with the Department of Labor, nor operating under ERISA, as Sokolow had falsely represented to various state insurance regulators.

highly prejudicial victim impact testimony to be admitted at trial. The district court allowed 20 NIBA members to testify that they were denied payment of their claims. Some witnesses were also permitted to testify as to collateral losses that they suffered. One witness, Kenneth Harris, who was injured in an auto race, was permitted to testify as to $238,111.46 in unpaid claims, and to his long hospitalization and prolonged rehabilitation. Additionally, he was permitted to testify as to problems with collection agencies. A year after the jury's verdict, the district court found that Harris's claims were "caused by non-covered activity," and, thus, he was not entitled to restitution. Sokolow also points to the testimony of Frank Yeager, who became a quadriplegic as a result of a gunshot wound. Sokolow asserts that collateral testimony as to this witness's injury, and repeated reference to the injury by government counsel in closing arguments, were unduly prejudicial.

In general, to satisfy the elements for mail fraud, "[p]roof of actual loss by the intended victim is not necessary." *United States v. Copple*, 24 F.3d 535, 544 (3d Cir.), *cert. denied*, --- U.S. ----, 115 S.Ct. 488, 130 L.Ed.2d 400 (1994). Evidence of loss, however, may be treated as evidence of the schemer's intent to defraud. *See id.* at 545. In *Copple*, we found that extensive victim impact testi-

mony as to collateral losses "went beyond anything that was reasonable to prove [defendant's] specific intent to defraud." *Id.* In that case, some of the objectionable collateral impact testimony included testimony that money used to pay back losses

------- **Page 91 F.3d 407 follows** -------

came from savings for children's college educations, that paying back the money had affected the witnesses' health, caused weight loss, and required depletion of all personal savings. *Id.* at 545-46. Accordingly, the court found that the district court erred in allowing the testimony as the "[t]estimony was designed to generate feelings of sympathy for the victims and outrage toward [defendant] for reasons not relevant to the charges [defendant] faced." *Id.* at 546.

In the case before us, the victims testified to a careful account of the dollar value of the loss suffered as a result of the fraud. Many of the victims also provided significant embellishment concerning adverse personal consequences, similar to the victims in Copple.[13] By

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[13] For example, Suzanne Plattner testified that she had been hassled by collection agencies, suffered from depression, and was completely tormented; David Ahakinian testified that "his life had been destroyed," that he was a

asking every victim who testified whether he or she suffered any adverse consequences from the unpaid claims, the government was attempting to highlight the personal tragedies of the victims.

Such testimony has little, if any, probative value and may be unfairly prejudicial. While normally the balancing under Federal Rule of Evidence 403 is done by the district court, for purposes of this discussion, we can assume, arguendo, that the testimony was in fact prejudicial because we believe that its admission was harmless.[14] "Trial error is harmless if it is highly probable that the error did not affect the judgment." *Id.* (citing *United States v. Simon*, 995 F.2d 1236, 1244 (3d Cir.

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"nervous wreck," and that he had attorney's bills to pay because his claim was denied. He further testified that Sokolow had "created a monster company." In addition, it appears that the claims of David Ahakinian and Kenneth Harris were properly denied coverage, yet the district court allowed into evidence their testimony regarding economic loss as well as adverse consequences.

[14] Except for the testimony of Kenneth Harris, Judge Scirica does not believe the other victims' testimony was prejudicial. In any event, the errors, if any, were harmless.

1993)). We stated in *Simon* that a high probability exists where the court has a " 'sure conviction that the error did not prejudice the defendant.'" 995 F.2d at 1244 (quoting *United States v. Asher*, 854 F.2d 1483, 1500 (3d Cir.1988) (citation omitted), *cert. denied*, 488 U.S. 1029, 109 S.Ct. 836, 102 L.Ed.2d 969 (1989)). In making this determination, we are not required to "disprov[e] every 'reasonable possibility of prejudice.'" *Id.* (citations omitted).

Here the error of admitting the adverse consequences testimony was harmless because, as in *Copple*, 24 F.3d at 526-47, the evidence of the scheme to defraud and of Sokolow's specific intent was overwhelming. As we have set forth above, the record is replete with proof of Sokolow's intentional misrepresentations to small business employers and employees and concealment of material facts which induced them to purchase what they believed to be fully insured health care coverage. Substantial evidence of the actual scheme to defraud was also presented at trial. Eighteen of the twenty victim-witnesses who testified were improperly denied coverage even though they paid premiums for what they believed to be a fully insured health care plan. Sokolow was forced to deny claims to make up for a shortage in the claims reserve fund, since he diverted a large portion of the collected premiums

to his personal bank accounts. Thus, it is "highly probable" that Sokolow would have been convicted of mail fraud even without adverse consequences testimony. Any error, therefore, was harmless.

B. *Defendant's Challenges to Jury Instructions*

1. *Scienter Element for Violation of Money Laundering Under 18 U.S.C. § 1957*

Sokolow asserts that the district court improperly instructed the jury on the scienter element of 18 U.S.C. § 1957.[15] That

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[15] The district court's instructions to the jury regarding the money laundering offense, read as follows:

> [T]here are five elements in money laundering:
>
> 1. The Government must prove beyond a reasonable doubt the defendant knowingly engaged or attempted to engage in a monetary transaction.
> 2. The defendant knew the transaction involved in this case, I am going to use the word money, monies that were criminally received.
> 3. The criminally derived property must have a value in excess of $10,000.
> 4. The criminally derived property must have been in fact derived from a specified

section makes it unlawful for a person to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." *Id.* The elements necessary to prove a violation of § 1957 are that

> (1) the defendant engage or attempt to engage (2) in a monetary transaction (3) in criminally derived property that is of a value greater than $10,000 (4) knowing that the property is derived from unlawful activity, and (5) the property is, in fact, derived from 'specified unlawful activity.'

United States v. Johnson, 971 F.2d 562, 567 n.3 (10th Cir.1992).

Defendant contends that the knowledge requirement of § 1957 requires "proof that Sokolow knew his conduct was prohibited by law." As Sokolow never objected to the instructions at issue, the court's review is limited to plain error, that is, the error must be "plain" and

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(cont'd)

> unlawful activity. That's the money laundering counts.
>
> 5. The money transaction must have taken place in the United States of America.

App. at 944-45.

"affect[ ] substantial rights." *See United States v. Retos*, 25 F.3d 1220, 1228-29 (3d Cir. 1994) (quoting *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993)); *see also* Fed.R.Crim.P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

In support of his argument, Sokolow relies primarily upon the Supreme Court decision in *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994). In *Ratzlaf*, the defendant was charged with violating 31 U.S.C. § 5324, which makes it unlawful for a person to "structure" numerous transactions with several banks to evade the banks' obligation to report cash transactions exceeding $10,000. *See id.* at 138-40, 114 S.Ct. at 658. Section 5322(a), Title 31, United States Code, imposes criminal penalties for a "person willfully violating" the antistructuring provision. At issue was the trial court's instruction that the government did not have to prove the defendant knew the "structuring" in which he engaged was unlawful, but only that the defendant knew of the reporting obligation and attempted to evade that obligation. In reversing the court of appeals, which upheld the conviction, the Supreme Court held that in order to give effect to § 5322(a)'s

"willfulness" requirement, the government must prove that the defendant knew the structuring in which he was engaged was unlawful. 510 U.S. at 148-50, 114 S.Ct. at 663. The Court was unpersuaded by arguments that the offense of structuring is "so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement [of § 5324 is] satisfied irrespective of the defendant's knowledge of the illegality of structuring." *Id.* at 146, 114 S.Ct. at 662.

Sokolow claims that the offense of money laundering is analogous to the offense at issue in *Ratzlaf*. He argues that engaging in monetary transactions, such as bank depositing, with known criminal proceeds is not conduct that is "obviously evil or inherently bad." Sokolow contends the jury must find that he knew his spending and regular bank transactions were prohibited by law.

Absent a "willfulness" requirement, however, we will not require proof of knowledge of illegality to sustain a conviction under the money laundering provision of 18 U.S.C. § 1957. In *United States v. Zehrbach*, 47 F.3d 1252, 1261 (3d Cir.), *cert. denied*, --- U.S. ----, 115 S.Ct. 1699, 131 L.Ed.2d 562 (1995), in discussing the proof necessary for bankruptcy fraud, we stated that "[t]he statutory requirement that the underlying acts be performed 'knowingly' requires only that the act be voluntary and inten-

tional and not that a person knows that he is breaking the law." In *Zehrbach*, we distinguished *Ratzlaf* on the basis of the "willfulness" element required under the structuring offense. *Id.*; *see also United States v. Hilliard*, 31 F.3d 1509, 1518 (10th Cir. 1994) (*Ratzlaf* proof of knowledge of illegality requirement not applicable to, *inter*

------- **Page 91 F.3d 409 follows** -------

alia, § 1957 money laundering provision); *United States v. Santos*, 20 F.3d 280, 284 n.3 (7th Cir.1994) (*Ratzlaf* not applicable to § 1956 money laundering provision because of absence of willfulness requirement). Similarly, as § 1957 does not contain a willfulness requirement, we decline to adopt Ratzlaf for the money laundering provision at issue in this case.

Moreover, Sokolow's citation to our decision in *United States v. Curran*, 20 F.3d 560 (3d Cir.1994), is distinguishable. In *Curran*, we followed *Ratzlaf* in construing the "willfulness" component of 18 U.S.C. § 2(b), which makes it unlawful to deliberately cause another person to perform an act that would violate federal criminal law. 20 F.3d at 566-68. In that case, defendant was charged with causing election campaign treasurers to submit false reports to the Federal Election Commission in violation of 18 U.S.C. Secs. 2(b) and 1001, the false statement statute. *Id.* at 562. Thus,

unlike the money laundering statute involved here, "willfulness" was an element of the crime at issue in *Curran*. *See id.* at 567-68. In sum, we find the district court properly instructed the jury on the scienter element of Sokolow's money laundering violation.

2. *Criminally Derived Property Element of § 1957*

Sokolow asserts that the district court committed plain error in the jury instruction as to the element of § 1957 that requires the criminally derived property in a monetary transaction to have a value in excess of $10,000. Specifically, Sokolow asserts that in the court's explanation of "tracing" criminal proceeds, the district court erred in stating the following:

> [T]he Government need not prove that there [sic] $20,000 came from this sale over here, because as I understand it, the Government's theory is these different sums--they have to initially prove they came from NIBA. It has to prove that it came from NIBA, initially, but not what NIBA account.
>
> So the matter goes from $20,000 from NIBA to Sokolow & Associates and then Sokolow & Associates spends the money or spends a similar sum of money some places. They don't have to prove it's the same $20,000 that went from Sokolow's

> [account] to Sokolow & Associates. The Government need not prove that all the property involved in the transaction was the proceeds of the money laundering. *It is sufficient if the Government proves at least part of the property represents such proceeds.*

App. at 945 (emphasis on alleged error). Sokolow alleges that the instruction "allowed the jury to convict simply on a showing that even $1 of the proceeds of fraud were deposited into a Sokolow account and later used to pay, in part, for the items charged [in the counts] of the indictment." We find this contention is without merit.

It is clear from the full context of the district judge's explanation of the concept of proceeds that he is addressing the absence of a legal requirement that the government trace the funds constituting criminal proceeds when they are commingled with funds obtained from legitimate sources. *See United States v. Johnson*, 971 F.2d at 570 (noting that there is no requirement that government "show that funds withdrawn from the defendant's account could not possibly have come from any source other than the unlawful activity."). We find no error in the district court's jury instructions in this regard.

3. *Sokolow's Responsibility for Actions of His Agents*

Sokolow alleges error in the district court's jury instructions as to Sokolow's

responsibility for actions of his agents, particularly as it relates to "insurance agents' improper use of the Blue Cross logo on advertisements as part of the fraud scheme." The instruction read as follows:

> In order to sustain the burden of proof in this matter, it is not necessary in either of these counts to prove -- these types of crimes -- to prove that the defendant did everything, every act. A person can act through his agent, and therefore, if the acts or conduct of another were ordered by the defendant or directed by the defendant or authorized by the defendant, the law holds the defendant responsible for the

------- **Page 91 F.3d 410 follows** -------

> acts, just as if he had personally done them. That includes both human beings and corporate agents.

App. at 945. According to Sokolow, the jury instruction is erroneous in that

> the jury could have found Sokolow guilty of mail fraud if he authorized employees to prepare marketing materials for his plan, and those employees on their own misrepresented the extent of Blue Cross underwriting in such materials. No proof that Sokolow directed the misrepresentations with an intent to defraud was demanded.

Appellant's Br. at 26. Sokolow quotes the court in *Curran*, 20 F.3d at 567, which stated that, "Section 2(b) [of Title 18, United States Code] imposes criminal liability on those persons who possess the *mens rea* to commit an offense and cause others to violate a criminal statute."

As defendant did not object to the jury instruction, we review the district court's failure to provide a specific instruction for plain error only. *See United States v. Xavier*, 2 F.3d 1281, 1287 (3d Cir.1993). Reading the jury instructions in context, the district judge clearly explains the scienter requirements to convict Sokolow of both the mail fraud and money laundering offenses. *See* App. at 941 ("[T]he defendant, Mr. Sokolow, is charged with knowingly and unlawfully devising and intend[ing] to defraud the members of [NIBA] ... and that he knowingly caused the United States [mails] to be used to execute these schemes or this scheme."); App. at 944 ("[T]he Government must prove beyond a reasonable doubt that there was--that not only was there a fraudulent activity, but the defendant had a conscious intent to defraud.... [T]he defendant himself did not have to mail anything. He may or he can order someone to do it."); App. at 945 ("The Government must prove that the defendant knew that property involved in the money transac-

tion constituted or was derived, either directly or indirectly from a criminal offense.... [H]e has to know he received this money through fraudulent means. He has to be conscious of that."). The jury was instructed properly that intent to defraud was required. Thus, we find no plain error in the district court's instruction and we affirm Sokolow's conviction.

III. CHALLENGES TO SENTENCING

A. *Calculation Under the Sentencing Guidelines*

In determining the Sentencing Guideline range, the district court grouped together Sokolow's mail fraud and money laundering counts pursuant to U.S.S.G. § 3D1.2(c)[16]. The higher offense level for the two groups, the money laundering offense, was used for computing the sentence. Sokolow does not contest the grouping of the counts.

1. *The "value of funds"*

Sokolow asserts that the district court incorrectly applied the Sentencing Guidelines to determine the "value of

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[16] All references to the United States Sentencing Guidelines Manual are to the 1988 version, as used in the presentence investigation report ("PSR") and apparently adopted by the district court, unless otherwise noted. *See* Appellant's Br., Addendum D at 2 n.2.

funds" involved in the money laundering offense. The "value of funds" involved in a money laundering offense is a specific offense characteristic. U.S.S.G. § 2S1.2(b). Under § 1B1.3, specific offense characteristics are determined by "relevant conduct," defined, inter alia, as

> (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;
>
> (2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.

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U.S.S.G. § 1B1.3(a)(1)-(2). When reviewing a district court's sentencing decisions, the court has plenary review over questions as to the meaning of the

Sentencing Guidelines. *United States v. Edmonds*, 52 F.3d 1236, 1244 (3d Cir. 1995). Factual determinations underlying the application of the guidelines are reviewed under the clearly erroneous standard. *Id.*

As to the money laundering counts, the presentence investigation report ("PSR") determined that over $2.2 million in proceeds from the unlawful mail fraud scheme had been laundered by Sokolow. PSR at 6. This amount represented the commissions received by Sokolow through AIM, and the related insurance agencies, Sokolow & McMillan, and Sokolow, McMillan & O'Leary. In addition to this amount, the district court added the additional $1.8 million Sokolow received in salary, officer's loans, and other disbursements to calculate the "value of funds" involved in the money laundering offenses under the Sentencing Guidelines. The district court concluded that Sokolow had converted $4 million from the mail fraud scheme for personal benefit, and, therefore, this amount represented the "accurate measure of harm from Defendant's money laundering offenses."[17] *See* Appel-

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[17] Section 2S1.2(b)(2) (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity) of the Sentencing Guidelines provides that:

> If the value of the funds exceeded $100,000, increase the offense

lant's Br., Addendum D, at 13. Sokolow argues the district court erroneously included the $1.8 million as relevant conduct of the money laundering offense, without determining whether that amount independently satisfied the elements of § 1957, namely, that Sokolow engaged in monetary transactions in criminally derived property of a value greater than $10,000. We disagree with Sokolow's contention.

We have previously noted that the commentary to U.S.S.G. § 2S1.1 does not define "the value of funds." *United States v. Thompson*, 40 F.3d 48, 51 (3d Cir.1994), cert. denied, --- U.S. ----, 115 S.Ct. 1390, 131 L.Ed.2d 242 (1995). In *Thompson*, we stated that "[the Commentary] states that '[t]he amount of money involved is included as a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise.'" *Id.* In *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir.

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> level as specified in § 2S1.1(b)(2).

U.S.S.G. § 2S1.2. Section 2S1.1(b)(2) lists the value of funds and the corresponding increase in offense level. The Guidelines prescribe a seven level increase in the offense level when the value of funds exceeds $3,500,000.

1992), the court stated that "the measure of harm under § 2S1.1 is the total amount of the funds involved." In dicta, the *Johnson* court noted that

> [F]unds associated with uncharged instances of money laundering can be added in to determine the offense level under § 2S1.1 if those acts are within the scope of relevant conduct under § 1B1.3-(a)(2). Thus, in determining the 'value of funds' under § 2S1.1, the district court is not necessarily limited only to the funds identified with the counts of conviction.

Id. at 576 n.10.

We find that the district court did not err in finding the additional $1.8 million as "relevant conduct" within the meaning of the Sentencing Guidelines. As previously noted, this amount was derived from Sokolow's unlawful mail fraud scheme. Further, Sokolow's accountant testified that the $4 million represented the total amount of funds disbursed from NIBA to Sokolow during the period relevant to the mail fraud scheme. As such acts were "part of the same course of conduct or common scheme or plan as the offense of conviction," U.S.S.G. § 1B1.3(a)(2), we find that the $1.8 million was properly considered "relevant conduct" under the Sentencing Guidelines even though this amount was not charged in the money laundering counts. *See*

United States v. Rose, 20 F.3d 367, 372-73 (9th Cir.1994) (finding that uncharged acts of money laundering may be considered in determining appropriate sentence under Sentencing Guidelines).

------- **Page 91 F.3d 412 follows** -------

2. *Abuse of position of trust enhancement.*

Sokolow received a two-level enhancement for abuse of position of trust under U.S.S.G. § 3B1.3. That section states, in relevant part:

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels.

U.S.S.G. § 3B1.3. At the time of the relevant offenses, Application Note 1 in the commentary to this section stated the following:

> The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to an embezzlement by an ordinary bank teller.

U.S.S.G. § 3B1.3, comment. (n.1).[18] In applying this section, "a sentencing

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[18] Application Note 1 of the Commentary

court must determine whether a defendant was placed in a position of trust, and if he was, whether he abused that position in a way that significantly facilitated his crime." *United States v. Craddock*, 993 F.2d 338, 340 (3d Cir. 1993). The inquiry into whether someone obtains a position of trust approaches a purely legal determination for which de novo review is appropriate. *Id.*; *see also*

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has since been clarified as follows:

> 'Public or private trust' refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult).

U.S.S.G. § 3B1.3, comment. (n.1) (1994).

United States v. Lieberman, 971 F.2d 989, 993 (3d Cir.1992). Whether or not a defendant abuses a position of trust more closely resembles a question of fact and is reviewed for clear error. *Craddock*, 993 F.2d at 340. Sokolow argued before the district court, as he does here on appeal, that enhancement for abuse of position of trust is inappropriate because Sokolow was not in a position of trust and because there were no "victims" to the money laundering counts.[19]

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[19] At sentencing, Sokolow received a two-level upward adjustment for his organizer/leader role in the mail fraud offenses under U.S.S.G. § 3B1.1. *See* Appellant's Br., Addendum D, at 5; PSR, ¶27, at 6. Under the sentencing guidelines in effect on the date of defendant's sentencing, the abuse of a position of trust adjustment would also apply to the mail fraud offenses, in addition to the organizer/leader role enhancement. *See* U.S.S.G. § 3B1.3 (1994). It appears, however, that because the new guidelines would result in an increased sentence, the district court adopted the PSR's use of the sentencing guidelines in effect at the time defendant committed the offenses. *See* Appellant's Br., Addendum D, at 2 n.2. Thus, an upward adjustment for the abuse of position of trust could "not be employed in addition to that provided for

Relying upon *United States v. Lowder*, 5 F.3d 467, 473 (10th Cir.1993), the district court rejected Sokolow's argument. In *Lowder*, the Tenth Circuit upheld an enhancement for abuse of position of trust for a money laundering conviction where (1) as a CPA, defendant provided tax and financial advice to elderly and unsophisticated clients; (2) he advised his clients to place their money with him and promised them security; and (3) as president of the fraudulent investment corporations, he was free to spend that money, without oversight. *Id.* In this case, the district court determined that Sokolow,

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in § 3B1.1." U.S.S.G. § 3B1.1. Accordingly, the abuse of position of trust enhancement could only apply to the money laundering counts. *See* U.S.S.G. § 1B1.11(b)(1) ("If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on date that the offense of conviction was committed."); *see also United States v. Corrado*, 53 F.3d 620, 623 (3d Cir.1995) ("to apply a change in the guidelines that enhances the penalty would offend *the ex post facto* clause of the United States Constitution").

as CEO and President of NIBA, abused a position of trust in facilitating the commission of the money laundering offenses. The court relied upon the fact that Sokolow marketed his insurance plans to small-business owners and self-employed persons, and was freely able to spend the derived monies as he wished.

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We agree with the district court's conclusion. In *United States v. Pardo*, 25 F.3d 1187, 1192 (3d Cir.1994), we explained that in determining whether a position constitutes a position of trust for purposes of § 3B1.3, a court must consider:

> (1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position.

Id. The court further stated that, "[t]hese factors should be considered in light of the guiding rationale of the section--to punish 'insiders' who abuse their position rather than those who take advantage of an available opportunity." *Id.*

Applying the Pardo factors to this case, we find that Sokolow held a position of trust under U.S.S.G. § 3B1.3.

First, as President of NIBA, Sokolow was able to commit difficult-to-detect wrongs, as he had sole control over NIBA's accounts without oversight or supervision. Second, Sokolow exercised the requisite degree of authority over the object of his wrong. It was within Sokolow's authority to withdraw funds from NIBA and that authority was necessary for the commission of the money laundering offenses.[20] Finally, as the district court noted, the funds to be laundered were derived from Sokolow's marketing of NIBA insurance plans to

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[20] Our reference to the money laundering offenses is only to the three money laundering counts that involved the laundering of monies from NIBA accounts to other assets that Sokolow owned or controlled. The remaining counts appear to us to have involved only transfers of criminally derived monies from personal accounts that Sokolow owned or controlled to other assets or accounts that Sokolow owned or controlled. As to these money laundering counts, we find no position of trust warranting the enhancement. *See United States v. Hickman*, 991 F.2d 1110, 1112 (3d Cir.1993) ("To abuse a position of trust, a defendant must, by definition, have taken criminal advantage of a trust relationship between himself and his victim.").

small business owners and self-employed persons. In selecting the NIBA health benefits plan for their employees and families, these members clearly placed a measure of reliance on the integrity of Sokolow in his position as President of NIBA. NIBA members testified to receiving materials regarding the health benefits plan, signed by Sokolow in his capacity as President.

Sokolow argues that no fiduciary relationship existed with NIBA members in connection with the submission of premiums. Unlike in Lowder, where the defendant induced elderly and unsophisticated clients to entrust money to him to invest securely on their behalf, Sokolow contends that NIBA members had no similar expectation with premiums entrusted to NIBA. We disagree. NIBA members submitted premiums with the expectation that their health care claims would be covered by NIBA. As president of NIBA, Sokolow was entrusted with the proper use of those funds. Thus, Sokolow held a formal position of trust vis-a-vis NIBA members.

As Sokolow occupied a position of trust, it must be determined whether he abused this position "in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. As indicated, the district court found that Sokolow's role as president facilitated the commission

of the money laundering offenses. Sokolow had significant authority over the distribution of NIBA funds. As the district court noted, Sokolow was "free to spend the money as he wished." Accordingly, we find that the district court did not clearly err in finding an abuse of position of trust. In sum, we will affirm the district court's application of the Sentencing Guidelines.

B. *The Restitution Order*

The district court ordered Sokolow to pay $690,246 in restitution to 17 NIBA members in the amount of unpaid claims for medical care and treatment. According to the government, the basis for calculating the losses was Gov't Ex. B-110, the Inservco compilation of adjusted, unpaid claims. The restitution amount excluded $238,111.46 claimed by Kenneth Harris for uncovered medical care claims. The district court stated that "[t]he evidence at trial and the sentencing hearing does not support any other reductions in the amount of restitution."

------- **Page 91 F.3d 414 follows** -------

Generally, the "district judge must point to evidence in the record supporting the calculation of loss to the victims." *Copple*, 24 F.3d at 549-50. Sokolow argues that other factual evidence in the record warrants further adjustment to many of the alleged unpaid claims. Sokolow cites five examples of NIBA members whose alleged unpaid claims should have been reduced.

(1) Martha Mosher submitted a $12,000 claim, which was valued by the liquidator at $512. The court awarded her $51,834.99. In Gov't Ex. B-110, this amount is listed as an adjusted unpaid claim for Shawn Mosher.

(2) Patricia and Gerald Ferrier's claims were valued by the statutory liquidator at zero. This amount is reflected in Gov't Ex. B-110. Yet, the district court granted them $3492 in restitution.

(3) Olivia Anderson submitted no documents in support of her claim, and a letter from the statutory liquidator stated that all her bills had been paid but one. The court granted her $47,654. Further, she is not listed in the excerpts of Gov't Ex. B-110, and the parties have not indicated from where this amount derives.

(4) David Ahakinian and William Vincent Bradford were allegedly not paid claims because they misrepresented preexisting conditions. They disputed these allegations on the witness stand. The district court awarded them $45,450 and $277,377 respectively.

See Appellant's Br. at 39-40.

Sokolow correctly contends that the basis upon which the restitution awards was granted is unclear from Gov't Ex. B-110, and often contradicted by trial testimony. We will remand the restitu-

tion order for the district court to make specific factual findings regarding the actual amount of recoverable loss sustained by these claimants.

C. *The Forfeiture Order*

The district court ordered Sokolow to forfeit $2,141,108.67, plus the contents of a Commonwealth Federal Savings and Loan Account, all to be satisfied from substitute assets.

1. *Identifiable Forfeitable "Property"*

Sokolow challenges the validity of the special verdict forms used by the jury with regard to 17 money laundering counts. As an example, the verdict forms for the counts read as follows:

> ITEM 1. $125,000.00
> We the jury find that the property identified as Item 1 is:
> a) Property involved in the violation of money laundering (18 U.S.C. § 1957) charged in Count 126 of the Indictment and[/]or property traceable to such property.
> YES _____
> NO _____

App. at 974. The jury marked "YES" for each of the monetary amounts listed for the money laundering counts. The criminal forfeiture provision provides as follows:

> The court, in imposing sentence on a person convicted of an offense in violation of [inter alia, 18 U.S.C.

§ 1957], shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

18 U.S.C[.] § 982(a) (1994). Sokolow argues that the special verdict forms are invalid because they failed to identify specifically the property involved. We disagree. Federal Rule of Criminal Procedure 7(c)(2) provides that

> [n]o judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

Fed.R.Crim.P. 7(c)(2). Further, Rule 31(e) provides that

> [i]f the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Fed.R.Crim.P. 31(e). The indictment specifically alleges the amounts involved, and from where the amounts are derived. We find

------- **Page 91 F.3d 415 follows** -------

that the special verdict forms elicited the proper findings from the jury.

2. Substitutable Assets

Sokolow argues that the forfeiture of substitute assets on the basis of the invalid special verdict forms was improper. As noted above, however, the verdict forms were appropriate, and, thus, Sokolow's argument on this ground is without merit.

Sokolow also challenges the order of forfeiture of substitute assets on the basis that the government failed to demonstrate that this action was appropriate. In general, we may not set aside the district court's factual findings unless they are clearly erroneous. *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 804 (3d Cir.1994). Forfeiture of substitute assets may be ordered if the property traceable to money laundering, as a result of any act or omission of the defendant,

> (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value, or (5) has been commingled with other property which cannot be divided without difficulty.

21 U.S.C. § 853(p) (1994). In this regard, the district court found that Sokolow diminished the value of certain real estate property owned by him, and transferred much of his assets to other

parties and family members, over whom he still exercised control. We find no clear error in the district court's order of forfeiture of substitute assets.

3. *Criminal Forfeiture Under Count 126*

Count 126 charged Sokolow with a money laundering transaction involving $125,000 made on October 4, 1988. The most recent amendment to the forfeiture statute, however, became effective on November 18, 1988. Sokolow asserts that, on *ex post facto* grounds, this forfeiture should be vacated.

Prior to November 18, 1988, 18 U.S.C. § 982 permitted the forfeiture of

> any property, real or personal, which represents the gross receipts the person obtained, directly or indirectly, as a result of such offense, or which is traceable to such gross receipts.

18 U.S.C. § 982(a) (Supp. V 1987) (emphasis added). The legislative history of the statute suggested a narrow reading of the statute stating that "gross receipts" meant "only the commission earned by the money launderer ..., and not the corpus laundered itself." S.Rep No. 433, 99th Cong., 2d Sess. 23 (1986). According to Sokolow, only later was the statute amended to cover "any property, real or personal, involved in such offense, or any property traceable to such property." Appellant's Br. at 48-49 (*quoting* Anti-Drug Abuse Act of

1988, Pub.L. No. 100-690 § 6463, 102 Stat. 4374 (1988)).

Neither party has cited any case law interpreting "gross receipts" to mean the "corpus laundered." The government argues, however, that where, as here, the defendant committed the specified unlawful activity as well as the money laundering violation, the corpus of the money is the "gross receipts" to the defendant and is thus forfeitable. We agree.

As Sokolow was the person committing the unlawful activity of mail fraud and also laundering money derived from that unlawful activity, it is clear that he obtained the total $125,000 as the "gross receipts" of the money laundering offense. There is no need for a finding that "Sokolow paid himself a commission for laundering his own money." *See* Appellant's Br. at 49. The money was derived from unlawful activity, and there is no evidence indicating that this does not represent the "gross receipts" of his money laundering scheme. As review by this court is for plain error (Sokolow did not challenge this issue at trial), we find that the district court did not err in instructing the jury to determine whether the $125,000 was the amount "involved in the violation of money laundering."

IV. CONCLUSION

In light of the foregoing, we will affirm the judgment of conviction and sentence, and the forfeiture order. We will remand for entry

------- **Page 91 F.3d 416. follows** -------

of a new restitution order in accordance with this opinion.

APPENDIX B

[1994 WL 613640]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.
v.	:	
CRAIG B. SOKOLOW.	:	93-394-01

MEMORANDUM

J. M. KELLY Nov. 1, 1994

Presently before the court is Defendant Craig B. Sokolow's Motion for a New Trial and Judgment of Acquittal. On March 18, 1994, a jury returned guilty verdicts against Defendant on 107 counts of mail fraud, in violation of 18 U.S.C. § 1341, and 17 counts of engaging in monetary transactions in property derived from unlawful activity, in violation of 18 U.S.C. § 1957.

BACKGROUND

At trial, the Government presented evidence that Defendant Craig B. Sokolow ("Sokolow") established and operated a group of closely held corporations between 1987 and 1990. Through these corporations, Sokolow marketed health benefit plans in approximately fifteen states, including Pennsylvania. The plans were marketed to small business employers. Sokolow maintained sole ownership and control of the corporations selling the health plans.

The Government presented evidence that Sokolow represented to the public that the plans were fully insured by well-known entities such as Blue Cross. In fact, the plans were self-funded. Blue Cross would not be responsible for any claims under $25,000. In 1988, the contract between Sokolow's corporations and Blue Cross was terminated when Sokolow failed to pay $2,000,000 in claims for which Blue Cross sought reimbursement. Sokolow switched to another company that would pay for claims above $50,000.

Sokolow also represented to Virginia and Maryland insurance regulators that his health plan was filed as an ERISA plan with the United States Department of Labor and thus exempt from state regulation. Sokolow did not have such a filing with the Department of Labor.

Sokolow's health plans received over $34 million in premium payments from plan members. The Government showed Sokolow's enrichment from the plans to be $4 million. Sokolow operated the health plans until they were suspended by the Pennsylvania Insurance Department on May 2, 1989, because it was an unlicensed insurance business. Sokolow consented to the liquidation of the plans pursuant to Pennsylvania law. Subsequently, the Statutory Liquidator assumed control of the plans.

The Government also offered proof of a money laundering scheme. Through his

various companies and bank accounts, Sokolow obtained money from the health plans for his personal use.

In his motion, Defendant Sokolow makes three arguments in support of acquittal and a new trial. First, Defendant argues that there was insufficient evidence to support the mail fraud convictions. Second, Defendant claims that the court improperly instructed the jury on the money laundering counts. Third, Defendant contends that the court improperly admitted certain evidence. For the reasons set forth below, Defendant's Motion for a New Trial and Judgment of Acquittal will be denied.

DISCUSSION

A. Insufficiency of Evidence

In his Motion for Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, Defendant argues that there was insufficient evidence to support the convictions for mail fraud under 18 U.S.C. § 1341 (1994 Supp.). Defendant relies on several factors. First, Defendant points to the claims of certain Government witnesses who were denied benefits under Sokolow's health plans. Defendant argues that it was legitimate to deny benefits to certain "victims". Defendant states that their claims were denied for rightful reasons. Defendant cites examples such as a claim arising out of injuries caused by non-covered activities and a

policyholder who allegedly misrepresented a pre-existing condition. Second, Defendant points to testimony that there was enough money to cover to pay valid claims as of May 2, 1989, the day Sokolow's plans were suspended by the Pennsylvania Insurance Department. Third, Defendant argues that the Government did not prove that Sokolow had the specific intent to commit mail fraud. Defendant claims that there was no deliberate misrepresentation of the nature of the health plans to the policyholders. Defendant states that he relied in good faith on the opinion of his lawyers that he had a valid ERISA plan. Defendant also claims that he made a good faith effort to arrange a takeover of the plan by a licensed insurance company.

Where the sufficiency of the evidence is challenged following a guilty verdict, the court must view the evidence in the light most favorable to the Government and resolve inferences in its favor. Government of the Virgin Islands v. Joseph, 964 F.2d 1380, 1381 (3d Cir. 1992); United States v. McNeill, 887 F.2d 448, 450 (3d Cir. 1989), cert. denied, 493 U.S. 1087 (1990). The verdict will be overruled only if no reasonable juror could accept the evidence as sufficient to support guilt beyond reasonable doubt. United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987), cert. denied, 490 U.S. 1070 (1989). Whether a new trial

should be granted on the basis that the verdict is contrary to the weight of the evidence is within the discretion of the trial court. United States v. Bevans, 728 F.Supp. 340, 343 (E.D. Pa.), aff'd, 914 F.2d 244 (1990) (citations omitted). The court may order a new trial if it ascertains that the verdict constitutes a miscarriage of justice. Id. As long as a rational trier of fact could have found the defendant guilty beyond a reasonable doubt, and the conviction is supported by substantial evidence, the verdict will be sustained. United States v. Gonzalez, 918 F.2d 1129, 1132 (3d Cir. 1990), cert. denied, 111 S.Ct. 1637 (1991).

Defendant Sokolow alleges that the evidence is insufficient to establish guilt of mail fraud under 18 U.S.C. § 1341. The essential elements of an offense under that section are (1) the existence of a scheme to defraud; (2) the participation by the defendant in the particular scheme charged with the specific intent to defraud and (3) the use of the United States mails in furtherance of the fraudulent scheme. United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994).

Defendant claims that denial of benefits were legitimate in the cases of some witnesses who testified at trial. The validity of the denials in the limited number of cases discussed by Defendant is, at best, debatable. There

was testimony by an auditor indicating that the some of the denials were wrongful. The fact that Defendant can argue that a few of the claims were correctly denied does not detract from the substantial evidence indicating that Defendant participated in a fraudulent scheme.

Defendant's main argument is that there was insufficient evidence of specific intent to commit mail fraud. Defendant claims that all of his actions were in good faith and that he made no intentional misrepresentations. The evidence presented at trial, however, was to the contrary. There was testimony, supported by documents created under Defendant's direction, that Defendant represented to policyholders that the plan was insured by well-known insurance companies. In reality, the insurance companies only administered claims. It was also established that Sokolow caused the Blue Cross/Blue Shield logo to be placed on premium notices. Policyholders testified that they believed they were covered by an insured health care plan. The experienced insurance agents who marketed Sokolow's plans also testified that they were misled as to the nature of the plans.

The specific intent to commit mail fraud, which Defendant claims did not exist in this case, can be found from a material misstatement of fact made with

reckless disregard for the truth. United States v. Boyer, 694 F.2d 58, 59-60 (3d Cir. 1982). The evidence presented at trial before this court met a higher standard, that of intentional misrepresentation. There was enough evidence for a reasonable juror to determine that Defendant had the necessary specific intent.

B. Jury Instructions

Defendant claims that there were three errors in the court's instructions to the jury. First, Defendant claims that the court incorrectly defined the intent necessary for a conviction on money laundering charges under 18 U.S.C. § 1957. Second, Defendant argues that the instructions permitted the jury to convict under that statute without meeting the $10,000 threshold. Third, Defendant states that the court did not define "monetary transactions". All of Defendant's jury instruction arguments do not require a new trial or acquittal.

Defendant contends that the court should have instructed the jury to convict Sokolow only if it was proved that he knew it was illegal to spend the proceeds of his health care scheme. Defendant relies on Ratzlaf v. United States, 114 S.Ct. 655, a Supreme Court case concerning "willful violations" of a statute prohibiting the structuring of transactions for the purpose of evading bank reporting requirements. Id. at 659.

The Court held in Ratzlaf that the jury should have been instructed that the defendant must have known that the structuring was unlawful in order to be convicted. Id. at 663.

The Ratzlaf case is not applicable to the instant case. The money laundering statute in question, 18 U.S.C. § 1957, requires that the defendant acted "knowingly". The caselaw indicates that Defendant, who is an attorney, need not have known that spending the proceeds was illegal in order to be found guilty under Section 1957. For instance, the Third Circuit recently discussed the intent necessary for a finding of guilt under the bankruptcy fraud statute, 18 U.S.C. § 152 (1994 Supp.), which prohibits "knowingly" and "fraudulently" concealing assets. The Third Circuit stated that for most crimes, to act " 'knowingly' or 'willfully' generally means no more than that a person knows what she is doing and that she does so voluntarily ... [i]t does not, in addition, mean that the person must know that she is breaking the law." United States v. Zehrbach, 1994 WL 96690 (3d Cir. March 28, 1994) (rehearing en banc granted, opinion and judgment vacated). The Third Circuit further noted that the "classic exception" to this rule was in income tax cases, where the complexity of the law justified requiring "knowing illegality" for a conviction. Id., citing Cheek v. United

States, 498 U.S. 192 (1991). Thus, the Third Circuit held that proof of knowledge of illegality was not required in the bankruptcy fraud prosecution.

The Seventh Circuit has addressed the intent requirement in United States v. Santos, 20 F.3d 280 (7th Cir. 1994), a money laundering case under 18 U.S.C. § 1956. In Santos, the court stated that the money laundering statute does not have a "willfulness requirement". Id. at 284 n. 3. The court specifically held that Ratzlaf, the case relied on by Defendant, is not applicable to money laundering. Id. In the present case, the court instructed the jury that the Government had to prove that Defendant knowingly engaged in a monetary transaction, and that Defendant knew that the transaction involved criminally received proceeds. As this court was not required to instruct the jury that Defendant knew it was illegal to spend the money, the instructions were proper.

The next argument by Defendant with regard to jury instructions is the $10,000 threshold of 18 U.S.C. § 1957. Defendant claims that under the court's instructions, the jury could have convicted Defendant even if it determined that an amount as little as $1 was involved. The court, however, instructed the jury that one of the five elements of money laundering under the statute was that "[t]he criminally derived property

must have a value in excess of $10,000." (Trans. March 11, 1994, pp. 88-89). Defendant quotes the following sentence: "It is sufficient if the Government proves at least part of the property represents such proceeds." (Trans. March 11, 1994, pp. 90-91). That sentence concluded the court's discussion of "proceeds", in which the court instructed the jury that the Government need not trace the proceeds from account to account, a point not disputed by Defendant. As the jury was instructed on the $10,000 requirement and as Defendant relies on a different point of charge in its argument, the court finds that the instruction was proper on this point.

Defendant's final jury instruction argument is that the court improperly instructed the jury on "monetary transaction" because the court failed to define "monetary instruments." The court referred to "funds" or "money", rather than the statutory definition of "monetary instruments", which also includes checks and investment securities. At trial, Defendant did not object to the court's instruction on this point. Thus, the "plain error" standard would apply. Fed.R.Crim.P. 52(b); United States v. Thame, 846 F.2d 200, 204 (3d Cir.), cert. denied, 488 U.S. 928 (1988). A failure to define "monetary transaction" under 18 U.S.C. § 1957 is not plain error unless the proper instruction would have caused

the jury to reach a contrary result. United States v. Lovett, 964 F.2d 1029, 1039 (10th Cir. 1992), cert. denied 114 S.Ct. 576 (1993). At trial, the Government presented extensive documentary evidence of Sokolow's use of monetary instruments. There is no indication that the jury would have reached a different verdict if other examples of "monetary instruments" had been given. Thus, the instructions were appropriate.

C. Evidence Objections

Defendant claims that the admission of certain evidence at trial was erroneous. Specifically, Defendant challenges the following: Government Exhibit No. B-110, which was a summary of the claims made by members of Sokolow's health plans; the Blue Cross claim summaries; Exhibit B-139, which was a Commonwealth Court opinion about Sokolow's plan; and the testimony by Sokolow's "victims" regarding the hardships they suffered due to lack of health insurance coverage. As discussed below, there was no error requiring acquittal or a new trial.

Defendant argues that the court erroneously permitted the admission of Government Exhibit No. B-110. B-110 was a summary of claims by plan members prepared by Inservco, an administrator hired to adjust claims by the Statutory Liquidator. Defendant argues that B-110 does not qualify for any exception to the

hearsay rule. Whether B-110 can be admitted under a hearsay exception is debatable, but those arguments need not be reached as B-110 can be considered an admission by Sokolow.

Federal Rule of Evidence 801(d)-(2)(C) states that a statement by a person authorized by the party to make a statement concerning the subject is an admission by a party-opponent and thus not hearsay. In the present case, Inservco summarized information held by the Statutory Liquidator, who in turn obtained the information from another administrator hired by Sokolow. Each entity that held the information had the express authorization of Defendant. As such, Exhibit B-110 is a party admission and was properly admitted.

Defendant contends that Blue Cross summary claims were inadmissible for the same reason as Exhibit B-110. Defendant, however, does little more than state that it was inadmissible. Thus, Defendant's challenge to the Blue Cross summary does not support acquittal or a new trial.

Defendant's next argument concerns the reading of Government Exhibit B-139, the Commonwealth Court opinion of Judge Colins in civil litigation involving Sokolow's health plan. At trial, the court permitted Deputy Insurance Commissioner Ronald Chronister to read parts of the opinion, in which Judge Colins determined that Sokolow's plan was not

licensed and not an ERISA trust. Defendant claims that reading a judicial opinion finding that Sokolow's plan was unlicensed was prejudicial as the jury could have relied on the Commonwealth Court's determination.

The court finds that Defendant was not prejudiced as a result of the opinion being read. First, the Government independently proved that contrary to Defendant's representation to insurance regulators, Defendant's plans were not filed with the Department of Labor under ERISA. Second, the court instructed the jury that the purpose of reading parts of the opinion was for historical background. The court instructed the jury that it should arrive at an independent decision based on the testimony of witnesses, exhibits and stipulations pursuant to the court's instructions on the law. The jury was cautioned against depending on a judicial opinion and had available substantial evidence of Defendant's guilt to consider. Defendant, therefore, was not prejudiced by this exhibit.

Finally, Defendant claims that the court erred in admitting "victim" testimony about the hardships they suffered because they lacked the health care coverage they believed they had. Defendant relies on United States v. Copple, 24 F.3d 535 (3d Cir. 1994), in which the Third Circuit held that the

trial court should not have permitted fraud victims to testify about the amount of financial losses and other harmful effects of the fraud. Id. at 546. Although the Copple court held that the error was harmless in light of the overwhelming evidence of guilt, Defendant argues that the instant case is distinguishable. The court disagrees. The defendant in Copple told victims that he was safely investing their money when he was actually converted it for his own use. Id. In this case, the Government presented evidence that Sokolow was enriched by about $4 million from the health care plans. In Copple, the defendant spent large sums of money for personal use. Id. The evidence in this case showed that Sokolow purchased homes and paid off loans with the proceeds of the plans. Finally, the Copple defendant prepared fictitious reports about the investment scheme. Id. In this case, there were documents showing that Sokolow misrepresented the nature of his plan to plan members and insurance regulators. The instant case is in fact similar to Copple, and thus the jury's verdict should not be disturbed.

Defendant has raised several challenges to the conduct of his trial. The fact remains, however, that there was ample evidence to support the jury's finding of guilt under both the mail fraud and money laundering counts. As

the court finds that the verdict was supported by substantial evidence and that there was no miscarriage of justice, the court will deny Defendant's motions.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.
v.	:	
CRAIG B. SOKOLOW.	:	93-394-01

ORDER

AND NOW, this 1st day of November, 1994, in consideration of Defendant's Motion for Judgment of Acquittal and a New Trial, the Government's Response, and all supplemental replies thereto, it is hereby ORDERED that Defendant's Motion is DENIED.

BY THE COURT:

s/ James McGirr Kelly
JAMES McGIRR KELLY, J.

APPENDIX C

[1995 WL 113079]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.
v.	:	
CRAIG B. SOKOLOW.	:	93-394

MEMORANDUM AND ORDER

J. M. KELLY **Mar. 14, 1995.**

Presently before the court is Defendant's Motion to Restrict Forfeiture to Designated Property. Defendant was convicted of 107 counts of mail fraud in violation of 18 U.S.C. § 1341, 17 counts of money laundering in violation of 18 U.S.C. § 1957(a) and criminal forfeiture under 18 U.S.C. § 982 for the money involved in each money laundering count.

Defendant argues that the specific amounts of money involved in each of the money laundering counts are not "property" under 18 U.S.C. § 982(a)(1). Defendant claims that the statute permits seizure of specific, guilty "res", and that the amounts of money in the money laundering counts are not real or personal property subject to forfeiture under the statute. Defendant cites a few cases generally, but none stand for Defendant's proposition that amounts of money cannot be forfeitable under 18

U.S.C. § 982.[1] There is no bar to the forfeiture of Defendant's property under the statute or case law. The legislative history of § 982 clearly provides for the forfeiture of money.[2] Criminal forfeiture is designed to punish the owner of the property and is an in personam judgment. United States v. Sandini, 816 F.2d 869, 873 (3d Cir. 1987). The case law clearly permits forfeiture of

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[1] 18 U.S.C. § 982(a)(1) provides, in relevant part:

> The court, in imposing sentence on a person convicted of an offense in violation of ... section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

[2] Congress defined "property involved" for § 982 as follows:

> [T]he term "property involved" is intended to include the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.

134 Cong. Rec. S17365 (Nov. 10, 1988).

specific amounts of money. Because money is fungible, the government need not receive the identical money involved, so long as the amount of money involved in the criminal activity is known. United States v. Conner, 752 F.2d 566, 576 (11th Cir.), cert. denied sub nom Taylor v. United States, 474 U.S. 821 (1985). See also United States v. Ginsburg, 773 F.2d 798, 801 (7th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) (in criminal forfeiture, government need not recover identical dollars, so long as amount involved is known); United States v. Delco Wire and Cable Co., Inc., 772 F.Supp. 1511, 1517 (E.D. Pa. 1991) (same). As such, the amounts of money specified in the jury verdict are forfeitable.

Defendant also challenges the government's position that substitute assets can be forfeited in this case. Under 21 U.S.C. § 853(p), as incorporated in 18 U.S.C. § 982(b)(1)(A), the court can order the forfeiture of the defendant's property other than the property traceable to the money laundering if that property (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value; or (5) has been commingled with other property which cannot be divided without difficulty. The conditions must

be a result of an act or omission by the defendant. 21 U.S.C. § 853(p).

In conjunction with his argument about amounts of money not being "property", Defendant contends that the only assets subject to forfeiture are certain real properties, a mortgage and a Commonwealth Federal account. Defendant states that any diminution in the value of his property is not due to any act or omission on his part. Rather, Defendant attributes the decline in the value of his property to a fall in the real estate market.

At the sentencing hearing, the government presented evidence that the decline in value was indeed a result of Defendant's actions. The government argues that Defendant made a poor investment decision in investing the forfeitable money in certain real estate. More important, the government established at the hearing that Defendant vacated a residence and subdivided other real estate, causing a reduction in value. Defendant also failed to perform certain work as required under a mortgage on another of his properties. Finally, the evidence at the hearing convincingly demonstrated that Defendant has transferred much of his assets to other parties, specifically members of his immediate family. The testimony at the sentencing hearing by Special Agent Mico-Monaco of the Office of Labor Rack-

eteering indicated that Defendant exercises control over accounts that are in the name of his family members or in trust for them. Thus, the requirements of 21 U.S.C. § 853 have been met, and substitute assets may be forfeited.

Accordingly, in consideration of Defendant's Motion to Restrict Forfeiture to Designated Property, the Response of the government and after hearing thereon, it is hereby ORDERED that Defendant's Motion is DENIED.

BY THE COURT:

s/ James McGirr Kelly
JAMES McGIRR KELLY, J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1367
(Consolidated with No. 95-1292)

UNITED STATES OF AMERICA,

vs.

CRAIG B. SOKOLOW,

Appellant

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and MCKEE, Circuit Judges, and RESTANI, Judge, Court of International Trade*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of

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* Judge Restani voted only as to panel rehearing.

the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Becker, Stapleton and Roth would have granted rehearing.

BY THE COURT,

s/Carol Los Mansmann

SEP 16 1996 Circuit Judge